No. 93-693

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

CITY OF BAYONNE,

Petitioner,

vs.

TOWN OF SECAUCUS, HUDSON COUNTY BOARD OF TAXATION, COUNTY OF HUDSON, BOROUGH OF EAST NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWNSHIP OF NORTH BERGEN, CITY OF UNION CITY, TOWNSHIP OF WEEHAWKEN and TOWN OF WEST NEW YORK,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a party challenges a statutory tax exemption on the grounds that it conveys a benefit to one beneficiary only and yet actively resists naming the beneficiary as a party to its law suit, does it comport with due process of law for a state court of last resort, upon striking the challenged statutory exemption as unconstitutional, to require the beneficiary to pay damages retroactive to the filing of the original complaint, as opposed to the date when the plaintiff, under court order, amended its complaint to name the beneficiary as a party defendant?

2. Where a state enacts a number of statutes permitting municipalities to opt-out of county-wide service programs and avoid the corresponding county assessment, does it violate the equal protection rights of a class of citizens when the state court of last resort strikes the statutory exemption affecting that class of citizens while leaving the other exemptions undisturbed?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, defendant City of Bayonne and the following parties, all respondents to this petition (listed as they appeared in the style of the case):

TOWN OF SECAUCUS, plaintiff-respondent;

HUDSON COUNTY BOARD OF TAXATION, defendant;

COUNTY OF HUDSON, defendant;

BOROUGH OF EAST NEWARK, defendant;

TOWN OF GUTTENBERG, defendant;

TOWN OF HARRISON, defendant;

CITY OF HOBOKEN, defendant;

CITY OF JERSEY CITY, defendant;

TOWN OF KEARNY, defendant;

TOWNSHIP OF NORTH BERGEN, defendant;

CITY OF UNION CITY, defendant;

TOWNSHIP OF WEEHAWKEN, defendant; and

TOWN OF WEST NEW YORK, defendant.

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Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Jersey entered in this action on August 4, 1993.

OPINIONS BELOW

The decision of the Superior Court of New Jersey, Law Division was rendered from the bench. The decision of the Appellate Division of the Superior Court of New Jersey is reported at 255 N.J. Super. 665, 605 A.2d 665 (N.J. Super. Ct. App. Div. 1992) (Appendix, *infra*, 43a). The Supreme Court of New Jersey granted certification, reported at 130 N.J. 393, 396; 614 A.2d 616 (N.J. 1992) (40a). The decision of the Supreme Court of New Jersey is reported at 133 N.J. 482, 628 A.2d 288 (N.J. 1993) (1a).

STATEMENT OF JURISDICTION

The final judgment of the Supreme Court of New Jersey was entered August 4, 1993. On September 22, 1993, the New Jersey Supreme Court denied Bayonne's application for a stay pending the filing of this petition for writ of certiorari. This Court has jurisdiction to review the judgment of the Supreme Court of New Jersey pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J. Const. Art. VIII, § 1, ¶ 1(a) (1947):

> Property shall be assessed for taxation under

> general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value except as otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.

N.J. Const. Art. IV, § 7, ¶ 9 (1947):

> The Legislature shall not pass any private, special or local laws. . . (6) Relating to taxation or exemption therefrom.

N.J. Stat. Ann. 18A: 54-37 (West 1989):

> [I]n any county of the first class having a population of not more than 700,000 according to the latest federal decennial census, each municipality included within a school district which has maintained for a minimum of 20 years a vocational education program approved for purposes of federal or State allotment of vocational funds by the Commissioner of Education under the regulation of State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.

STATEMENT OF THE CASE

The City of Bayonne is a tightly knit, primarily residential community of just over 60,000 residents. It is part of Hudson County, New Jersey and is located on a peninsula just south of Jersey City, at the mouth of New York Harbor. Beginning in 1931, Bayonne pioneered, in the State of New Jersey, the concept of providing vocational education for its residents. At that time, no other New Jersey county or municipality provided this service, and the Bayonne Vocational Technical School, over time, became widely admired throughout the state.

As the vocational education concept gained favor, other political subdivisions began to emulate the Bayonne program. In particular, Hudson County, beginning on or about 1972, resolved to construct and operate its own vocational school. The impact on Bayonne was painfully obvious. Its taxpayers would pay for the Bayonne program and a redundant (to this day, no Bayonne student has ever elected to attend the Hudson County vocational program) assessment for the Hudson County Vo-Tech. In 1973, the New Jersey Legislature addressed the situation. While the lawmakers acknowledged that counties could form their own vocational districts and support them by assessing their constituent municipalities, the Legislature also sought to protect Bayonne's uniquely situated program, which predated that of Hudson County by some *two generations* and was widely recognized as a leader in the field.

To effectuate these dual goals, the Legislature enacted, and the Governor signed into law, an Act codified as N. J. Stat. Ann. 18A:54-37 (West 1989) (hereinafter referred to as the "Act"). In its present form, the Act reads:

> Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey

> Statutes, in any county of the first class having a population of not more than 700,000 according to the latest federal decennial census, each municipality included within a school district which has maintained for a minimum of 20 years a vocational education program approved for purposes of federal or State allotment of vocational funds by the Commissioner of Education under the regulation of State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.

Bayonne readily admits that the Act, both in its original form and as amended in 1981, is intended to exempt Bayonne, and for now[1] only Bayonne, from paying tax to support its county vocational school. The Act thus expresses the lawmakers' intent that the residents of Bayonne, who had voluntarily taxed themselves for *over forty years* before the County of Hudson even constructed a vocational school building, should not have to shut their school to avoid double taxation.

It is important to-recall that the Act was passed at a critical juncture and that very significant consequences flowed from its passage. In 1972, after Bayonne had educated nearly two generations of vocational students, the Board of Education of the Hudson County Vocational School resolved to commence and operate its own program. The following year, it proposed a $2,000,000 budget for operation of the County Vo-tech. Clearly, the Bayonne program was at a crossroads. But for passage of the

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1. Beginning in 2000, the Town of Kearny will qualify for the exemption.

Act, Bayonne could have decided to "wind-down" its program. Bayonne could have elected to pay the double tax. Other arrangements could have been made. Bayonne could have offered its existing facility to the County Vocational School Board. In any event, what is relevant is not the number of choices available, but that the passage of the Act obviated the need to make a choice. The New Jersey Legislature passed the Act in 1973 and amended it in 1981. In each case, it intended to continue and further the Bayonne program and spare the City's taxpayers the need to make that choice.

Because of the Act, Bayonne continued to tax its residents to run and modernize its vocational program. Its reliance was certainly justified. The Act was supported by Hudson County's representatives to the New Jersey Legislature, and no other Hudson County municipality, including, significantly, the Town of Secaucus, registered any objection. Thus, for nearly another generation, the taxpayers of Bayonne paid for their vocational program and the residents of the other Hudson County municipalities paid for theirs.

In New Jersey, counties are not "taxing districts".[2] They lack the authority to collect tax revenues directly from citizens. Instead, each county passes an annual budget and assesses its component municipalities their pro rata share. The municipalities, in turn, include the county levy in the tax bills they forward to each property owner. Municipalities are responsible for timely payment of the county levy regardless of whether they have received tax payments from the property owners. Counties fund changes to their budgets by levying "added and omitted assessments" upon the municipalities. In order to comply with the Act, the Hudson County Board of Taxation (hereinafter referred to as the "HCBT")

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2. A point reinforced by the New Jersey Supreme Court in this litigation. 133 N.J. at 504-05, 628 A.2d at 299-300 (Appendix, *infra*, 25a).

struck two (2) different county tax rates. The rate applied to Bayonne excluded any payment toward the Hudson County vocational school.

When this litigation began, it did not involve Bayonne at all. On October 17, 1986, the Town of Secaucus commenced a civil action in lieu of Prerogative Writ in the Law Division of the New Jersey Superior Court. *The only named defendants were the County of Hudson and the Hudson County Board of Taxation ("HCBT").* Secaucus' *sole* allegation was that the defendants' application of the "two-tiered" tax rate to added and omitted assessments was improper because none of the monies so collected were earmarked toward the Hudson County vocational school. Secaucus sought relief retroactive to 1981. As the defendants correctly noted, and alleged in their Answers, the other Hudson County municipalities were indispensable parties to the litigation. This was particularly so as to Bayonne, which ultimately stood to pay any judgment in the plaintiff's favor. Secaucus, however, declined to implead the other municipalities, much less implead Bayonne.

In a 1987 bench ruling, the trial judge held that because the added and omitted assessments were raised under the two-tiered tax rate, they necessarily included a vocational school component. He ordered the County to escrow that "component" and dedicate it solely to fund the vocational school in the next applicable budget year. All the *original* parties cross-appealed. The Appellate Division of the Superior Court of New Jersey, on May 18, 1988, declined to decide the substantive dispute and remanded the case, instructing Secaucus to amend its Complaint to name Bayonne and the other Hudson County municipalities. Secaucus filed its Second Amended Complaint on September 20, 1988.

It was thus only after the two-tiered rate (which Secaucus contended benefited Bayonne exclusively) had continued in force for nearly two (2) years after the litigation commenced (and more

than 15 years after the initial passage of the Act) that Secaucus finally named Bayonne a party defendant. Secaucus also drastically expanded the scope of the relief sought. For the first time, Secaucus directly attacked the constitutionality of the Act, claiming it violated the uniformity[3] and special legislation[4] clauses of the New Jersey Constitution. Bayonne, in defending the action, argued that the statute should be sustained, and, implicitly, that if the Act was stricken, the rights safeguarded to the residents of Bayonne by the Constitution of the United States would be impermissibly infringed. On August 9, 1990, the trial court entered summary judgment in Secaucus' favor, ruling that application of the two-tiered rate to the added and omitted assessments was discriminatory. Its Order (56a) declared the Act, and, by extension, the two-tiered tax rate, invalid, as violative of both clauses. The Court abolished the two-tiered rate, effective 1990. It also granted Secaucus relief as to the added and omitted assessments dating back to 1986, when the original Complaint was filed. This was *two (2) years before* Bayonne was named a defendant in this action.

Bayonne and the Hudson County Board of Taxation appealed and obtained a Stay of the trial court's ruling (52a). Secaucus appealed to the Supreme Court of New Jersey, which partially vacated the stay (51a). Its Order, entered by the Clerk of the New

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3. "Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value except as otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district." N.J. Const. Art. VIII, § 1, ¶ l(a) (1947).

4. "The Legislature shall not pass any private, special or local laws. . . (6) Relating to taxation or exemption therefrom." N.J. Const. Art. IV, § 7, ¶ 9 (1947).

Jersey Supreme Court on August 31, 1990, vacated the stay as to that part of the trial court's decision barring utilization of the two-tiered rate for tax year 1990 and forward. Because of this decision, Bayonne has been supporting both Vo-techs even as the litigation continued. The stay remained in force, however, as to the pre-1990 added and omitted assessments.

On April 21, 1992, the Appellate Division of Superior Court affirmed the trial court's ruling that the Act violated the uniformity clause. *Town of Secaucus v. Hudson County Board of Taxation,* 255 N.J. Super. 665, 605 A.2d 665 (N.J. Super. Ct. App. Div. 1992) (43a). It did not reach the question of whether the Act constituted special legislation.

At the request of Bayonne and the Hudson County Board of Taxation, the Supreme Court of New Jersey granted certification. 130 N.J. 393, 396; 614 A.2d 616 (N.J.1992) (40a). On August 4, 1993, that Court, over a rare two (2) justice dissent, held that the Act violated the New Jersey Constitution's prohibition against special legislation. *Town of Secaucus v. Hudson County Board of Taxation,* 133 N.J. 482, 628 A.2d 288 (N.J. 1993) (1a). Technically, the New Jersey Supreme Court did not reach the uniformity issue but it is very clear from the majority opinion that the Appellate Division ruling had been at least implicitly reversed.

By affirming, the 5-2 New Jersey Supreme Court majority[5] not only barred utilization of the two-tiered rate beginning in 1990, it required HCBT to debit Bayonne for added and omitted assessments *from 1986,* when Secaucus filed its original Complaint. As a result, Bayonne is not only required to support both vocational programs, it must also, within a "reasonable" time,

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5. The overwhelming majority of New Jersey Supreme Court decisions are issued by a unanimous court; dissents are rare and two (2) justice dissents rarer still.

reimburse the County retroactive to 1986, when it *was not even a party to this suit.* 133 N.J. at 508, 628 A.2d at 301.

On September 22, 1993, the New Jersey Supreme Court denied Bayonne's application for a stay (which would only apply to the added and omitted assessments) pending the filing of a Petition for Writ of Certiorari to the Supreme Court of New Jersey. On October 7, 1993, the Honorable David H. Souter, Circuit Justice for the United States Court of Appeals for the Third Circuit, also declined to issue a stay.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL DIMENSION REGARDING THE EXTENT TO WHICH A PARTY CAN BE HELD LIABLE FOR DAMAGES ACCRUED WHILE A PLAINTIFF ACTIVELY RESISTS BRINGING THE REAL PARTY-IN-INTEREST INTO AN ACTION FOR TACTICAL AND STRATEGIC REASONS.

From the onset of this civil action it was manifest that only Bayonne could conceivably be liable for any judgment in Secaucus' favor. Secaucus has, at all times, alleged that the two-tiered tax system favored Bayonne at the expense of the other Hudson County municipalities. This was the gravamen of Secaucus' 1986 Complaint and even then the named defendants asserted that Secaucus had failed to join indispensable parties including Bayonne. When Secaucus was finally ordered, on appeal, to add Bayonne and the other Hudson County municipalities, the two-tiered tax rate had continued in force for another two (2) years.

Although they denied doing so, the New Jersey courts have

awarded Secaucus retroactive relief. That is, in addition to ordering utilization of a single-tiered tax rate commencing in 1990, they applied this newly decreed rate to the Hudson County added and omitted assessments back to 1986. Although Bayonne was the only party liable on the judgment, it was not named a defendant until 1988. The Supreme Court of New Jersey apparently felt that the ordered relief was not retroactive because the Court rejected Secaucus' demand for damages back to *1981:*

> Bayonne urges that should the statute be declared invalid, any financial relief to be granted to Secaucus and similarly-situated municipalities should relate only to the 1989 tax year and thereafter. The partial remedy ordered by the trial court, which the Appellate Division affirmed, is deemed by Bayonne to be impermissible retroactive relief.
>
> The Appellate Division rightly rejected this argument. 255 N.J. Super. at 670-71 [605 *A.2d* at 1153-54]. The partial judgment of the trial court, as the Appellate Division noted, 'simply preserves the relief for that period given the non-Bayonne municipalities in the first judgment. That relief is not retroactive to the Complaint. Id. at 671.'

Secaucus v. Hudson County Tax Board, supra, 133 N.J. at 508, 623 A.2d at 301 (Appendix, *infra*, 29a).

Respectfully, none of this addresses the question of whether the trial court properly ordered pre-1988 payments when Bayonne was not party to the pre-1988 suit. Indeed, of the "non-Bayonne" municipalities, none, save Secaucus, were pre-1988 parties. The 1986-88 portion of the decision below thus requires one non-party,

Bayonne, to pay other non-parties (the non-Secaucus municipalities) literally millions of dollars.

Where a plaintiff brings a defendant into an action by filing an amended or supplemental complaint, "the filing of such additional pleading constitutes the commencement of the action in so far as such new defendant is concerned." *Mears v. Economy Brake Service, Inc.* 78 N.J. Super. 218, 227, 188 A.2d 207, 212 (N.J. Super. Ct. App. Div.), *certif. denied,* 40 N.J. 216, 191 A.2d 59 (N.J. 1963); *Ioannou v. Ivyville Park Section 4, Inc.,* 112 N.J. Super. 28, 37, 270 A.2d 300 (N.J. Super. Ct. Law Div. 1970). In the case at bar, the New Jersey court claims to have rejected retroactive relief, deeming relief proper as of the commencement of Secaucus' action. Yet, as *Mears* and *Ioannou* make clear, the action did not commence as to Bayonne until September 20, 1988, when Secaucus, which had long resisted doing so, and acting only at the behest of the intermediate appellate court, filed its Second Amended Complaint and thereby added Bayonne to this suit.

Indeed, the entire pre-1988 suit could be considered a sham, designed to maximize Bayonne's potential liability. Even a cursory review of the facts indicates that Bayonne was, at all times, the *only* party who could be held liable for Secaucus' "damages". Certainly the original defendants, the County of Hudson and the Hudson County Tax Board, could not be so held. It is thus abundantly clear that Secaucus omitted Bayonne from its suit as a "strategic or tactical choice" and not because of any mistake. *Cf. Anderson v. Deere & Co.,* 852 F.2d 1244, 1248 (10th Cir. 1988). Secaucus nonetheless elected to pursue its "sham" defendants, and the courts of New Jersey have ratified that decision by measuring damages from when Secaucus sued Hudson County and HCBT, not when it finally added Bayonne, the party with an actual pecuniary interest in the litigation.

To the extent that the New Jersey court of record requires

payments for the pre-1988 period, it violates the due process rights of Bayonne and its taxpaying citizens. If the damages clock runs, as New Jersey's courts say it does, from commencement of the action, it violates due process to require Bayonne to pay for the period before the action, as to Bayonne, had commenced.

The New Jersey Rules of Court, at R. 4:9-3, contain the analogue to the federal "relation-back" doctrine, Fed. R. Civ. P. 15(c). That doctrine, however, applies where a plaintiff seeks to amend his or her complaint to name a new defendant as to whom the applicable statute of limitations has already run. The Supreme Court of New Jersey describes the principles underlying the doctrine thus:

> 'It is indisputably the rule that an entirely new and different cause of action cannot be introduced *after the statute has tolled the action.*' But is equally well settled 'that an amendment will not, as a rule, be held to state a new cause of action, if the facts alleged show substantially the same wrong with respect to the same transaction, of if it is the same matter more fully or differently laid, or if the gist of the action or the subject of controversy remains the same'.

Russo v. Wright Aeronautical Corp., 1 N.J. 417, 419, 64 A.2d 71, 71-72 (N.J. 1949). (Emphasis added and citations omitted).

There is no limitations issue in this case, obviating any further discussion of the "relation-back" concept. It should be noted, however, that the applicable New Jersey rule, like the federal rule, requires that any new claim arise out of the "conduct, transaction or occurrence" set forth in the original pleading. Here, Secaucus

added an entirely new claim in 1988. The original complaint only challenged application of the two-tiered rate to added and omitted assessments. Indeed, it could be said that the original suit was carefully tailored to avoid a direct constitutional challenge to the Act. Secaucus' second amended complaint adds the constitutional challenge and expands the scope of the alleged discriminatory conduct to encompass the entire county budget. In light of the plaintiff's failure to include these charges at the commencement of its suit, Secaucus is precluded from seeking damages from Bayonne retroactive to the commencement of the original action. Any claim that the second amended complaint somehow relates back to 1986 simply misses the mark.

II.

THE SUPREME COURT OF NEW JERSEY VIOLATED THE RIGHTS OF BAYONNE AND ITS TAXPAYERS BY STRIKING THE ACT WHILE ALLOWING FACTUALLY INDISTINGUISHABLE OPT-OUT STATUTES TO STAND.

The Act in question is but one example of a long-standing state policy allowing municipalities to opt out of county-wide services that would duplicate ones provided locally and where payment of a county levy would amount to double taxation. The courts below offer not even a whiff of disapproval of those statutes. In effect, the Supreme Court of New Jersey has held that Bayonne and its taxpayers are the sole class of New Jersey residents ineligible for menu-type opt-out services. There can be no "rational basis" for this result. Bayonne and its taxpayers have been deprived of the equal protection of the laws as safeguarded in the United States Constitution as applied to the States by the Fourteenth Amendment.

New Jersey's county boards of taxation, pursuant to statute, have been permitted to apportion tax revenue (and therefore tax

rates) to a county library system *only* amongst those municipalities that participate in the applicable system. Under N.J. Stat Ann. 40:33-9:

> The sum so to be raised shall be certified by the Board of Chosen Freeholders to the County Board of Taxation, *which shall apportion such amount among the municipalities receiving the benefits of this article* in accordance with the provisions of 54:4-49 of the Revised Statutes. (Emphasis added)

This two-tier system is again demonstrated by the legislative mechanism applicable to county health services. The cost of those services are apportioned *only* amongst those municipalities who participate in the program. County health department budgets are submitted separately and apart from the county budget to the County Board of Taxation and there is a separate two-tier apportionment of taxation by use of the apportioned values established under N.J. Stat. Ann. 26:3A2-1, *et seq.* (Local Health Services Act):

> Such sum as approved by the board of chosen freeholders shall be certified by the board of chosen freeholders to the county board of taxation *which shall apportion such amount among the municipalities participating in the county health department.*

N.J. Stat. Ann. 26:3A2-19. (Emphasis added).

Indeed, the Supreme Court of New Jersey has specifically upheld legislation benefiting, as does the statute in question, one (1) municipality only. Thus, the New Jersey court has approved an Act requiring a rebate of county taxes to a

> taxing district in a county of the first class having an excess of 800,000 population in which there has been located a State or county institution other than a park commission or lands owned or occupied by a park commission occupying more than 200 acres and not in excess of 400 acres of land, in the aggregate . . . .

N.J. Stat. Ann. 54:4-5. This statute admittedly applied to one municipality only (the Township of Mahwah) and was also population based in a manner identical to that of the Act in question. This statute was upheld. *Mahwah Township v. Bergen County Board of Taxation,* 98 N.J. 268, 486 A.2d 818 (N.J. 1985). In *Mahwah*, the New Jersey Supreme Court listed examples of acceptable statutes involving classifications based upon municipal and/or county populations, as is the case with the Act at issue here:

> *N.J.S.A.* 43:10-7 allows counties of the first class to impose in their tax levy taxes sufficient to meet the requirements of the employees' pension fund. *N.J.S.A.* 30:9-24 allows counties of the first class to establish maternity hospitals, issue bonds, and tax for the payment of those bonds; *N.J.S.A.* 40:22-14 allows first class counties to tax for the payment of salaries of the county police for the regulation of traffic; *N.J.S.A.* 40A:9-117.2 relates to the appointment of uncompensated deputy sheriffs in counties having populations greater than 900,000; *N.J.S.A.* 40A:9-117.5 provides for Chief Warrant officers in first class counties with populations in excess of 600,000 but less than 700,000; *N.J.S.A.* 51:1-43 requires appointment of a superintendent of weights

> and measures in municipalities of 60,000 or over.

Mahwah, supra, 98 N.J. at 286-87, 486 A.2d at 828.

If these statutes, by way of example, are "rationally related to a legitimate government interest," *See Midnight Sessions, Ltd. v. City of Philadelphia,* 945 F.2d 667, 682 (3rd Cir. 1991), *rehearing denied, cert. denied,* __ U.S. __, 112 S. Ct. 1968 , 118 L. Ed. 2d 389 (1992), and thus comport with the substantive due process protection of the United States Constitution, then why not the Act at issue?

The resultant distinction between Bayonne and its taxpayers and every other New Jersey municipality amounts to "arbitrary and irrational discrimination", violative of the equal protection clause of the Fourteenth Amendment even under the most deferential standard of review. *See generally, Bankers Life and Casualty Co. v. Crenshaw,* 486 U.S. 71, 83, 108 S. Ct. 1645, 1653, 100 L. Ed. 2d 62 (1988). The distinction serves no "legitimate state interest", *e.g., City of Cleburne, Texas v. Cleburne Living Center,* 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985) and must therefore fall, by sustaining the application of New Jersey's general standards of local services financing to Bayonne, as the Legislature intended. The citizens of Mahwah, for example, were deemed exempt from double taxation but not those residents and citizens of Bayonne.

There can be no "rational basis" for this distinction. If a municipality such as Bayonne has its own health department and/or its own library, the New Jersey courts have seen fit to permit the Legislature to enable those municipalities to escape financial (through taxation) responsibility for unused services. It is a properly determined legislative choice, namely that municipalities should be exempted from taxation for paying for county services

where those municipalities have their own programs, that formed the basis of the Act. The New Jersey courts acted with no "rational basis" when they struck down the Act and subjected Bayonne, alone among the municipalities affected by the various menu type acts, to onerous double taxation. The rights of Bayonne's taxpayers to equal protection of the laws has been impermissibly abridged and therefore this Court must rectify this terrible injustice.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari must be granted by the Court so that the residents and citizens of Bayonne can receive the benefit of the substantive due process and equal protection guarantees secured by the United States Constitution.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF NEW JERSEY DECIDED AUGUST 4, 1993

628 A.2d 288

TOWN OF SECAUCUS, PLAINTIFF-RESPONDENT, v. HUDSON COUNTY BOARD OF TAXATION AND CITY OF BAYONNE, DEFENDANTS-APPELLANTS, AND COUNTY OF HUDSON, BOROUGH OF EAST NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWNSHIP OF NORTH BERGEN, CITY OF UNION CITY, TOWNSHIP OF WEEHAWKEN AND TOWN OF WEST NEW YORK, DEFENDANTS.

Argued February 17, 1993 — Decided August 4, 1993.

Margaret A. Holland, Deputy Attorney General, argued the cause for appellant Hudson County Board of Taxation (*Robert J. Del Tufo*, Attorney General of New Jersey, attorney; *Joseph L. Yannotti,* Assistant Attorney General, and *Mary C. Jacobson*, Deputy Attorney General, of counsel).

Eric Martin Bernstein argued the cause of appellant City of Bayonne (*Weiner & Lesniak*, attorneys; *Mr. Bernstein, Beth Jaffe,* and *Nicholas A. Panepinto,* of counsel).

Frances C. Holland argued the cause for respondent (*Holland & Holland,* attorneys).

The opinion of the Court was delivered by

HANDLER, J.

This case asks the Court to resolve the question whether a statute enacted under the education laws that exempts the City of

Bayonne from paying its share of taxes committed to the operation of the Hudson County Vocational School violates the State Constitution. In implementing the tax exemption, Hudson County established a two-tier tax system under which Bayonne paid a county tax rate lower than that of all other municipalities in Hudson County. The Town of Secaucus challenged that two-tier system as violating both the prohibition on special legislation, article IV, section 7, paragraph 9(6), and the uniformity clause, article VIII, section 1, paragraph 1, of the New Jersey Constitution. The trial court found for Secaucus on both those grounds. The Appellate Division affirmed that decision on uniformity clause grounds, but failed to reach the question of whether *N.J.S.A.* 18A:54-37 constituted special legislation. *Secaucus v. Hudson County,* 255 *N.J.Super.* 665, 605 *A.2d* 1151 (1992).

The Hudson County Board of Taxation petitioned this Court from that decision and we granted certification, 130 N.J. 396, 614 *A.2d* 618 (1993), to decide whether the exemption statute is constitutionally invalid.

I.

The City of Bayonne, located in Hudson County, has operated a vocational-educational program since 1931. Originally, Bayonne implemented that program through a separate vocational high school. In the 1960s, however, Bayonne created a comprehensive high school that fully integrated the vocational program into its general high school curriculum. Bayonne's vocational-education program, which has been widely praised, allows vocational students to participate fully in school activities and attend many classes with general education high school students.

In 1972, the Board of Education of the Hudson County Vocational School (hereafter "HCVS" or "county vocational

school") passed a resolution authorizing the acquisition of a building for a new county vocational school. The following year, a $2 million budget was proposed for the operation of HCVS, and in 1974 HCVS began operating from its own facility. Realizing that the Bayonne vocational program, by that time in existence more than forty years, would not be discontinued, and wanting to spare Bayonne the double expense of supporting its own and the county's vocational programs, State legisiators from Hudson County proposed legislation exempting Bayonne from contributing to the maintenance of the county vocational school.

The terms of the original legislation, proposed as *Senate Bill* 74 in the 1972 Legislative Session, were quite broad. Those terms provided that

> each municipality included within a school district maintaining a system of vocational education approved for the purposes of Federal or State Allotment of vocational funds by the Commissioner of Education under the regulations of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.

The effect of the original legislation would have exempted virtually every municipality with a vocational-education program from contributing to the support of its county's vocational school. Recognizing that, Senate Education Committee amendments to *Senate Bill 74* significantly narrowed the scope of the exemption in order to exempt only Bayonne from the general obligation to support county vocational-educational programs. That narrowing

was achieved by limiting the effect of the legislation in two ways. First, the amendments restricted the municipalities affected only to those in a "county of the first class having a population of not more than 700,000 according to the 1970 Federal Census." *L.*1973, c. 305. § 1. In 1973, *N.J.S.A.* 40A:6-1 defined a first class county as "a county having a population of more than 600,000." By that criterion, Bergen County (1970 population 897,148). Essex County (1970 population 932,526), and Hudson County (1970 population 607,839) qualified as first class counties. Only Hudson, however, met the amended statute's population requirement for the tax exemption.

Second, the amendments required that in order for a municipality to qualify for the exemption, its vocational program would have to have been in existence, as a program approved by the State Board of Education for state or federal funding, for at least twenty years. Because, among the Hudson County municipalities, only Bayonne had a vocational education program in existence and approved by the State for at least twenty years, the amended statute applied only to Bayonne. The statement to the bill, from the Senate Education Committee, left no doubt about the intent of the legislation: "This bill, as amended, would exempt the City of Bayonne from any assessment of taxes due to the cost of supporting the county vocational school in Hudson County."

When the 1980 census revealed a reduction in Hudson County's population to 556,972, thereby jeopardizing its first-class status, the Legislature, by *L.*1981 c. 462, § 44, established population density as a new criterion and amended *N.J.S.A.* 40A:6-1 to redefine counties of the first class as "counties having a population of more than 550,000 and a population density of more than 3,000 persons per square mile." Under that reclassification, Hudson County, with a density of 12,801.1 residents per square

mile, retained its status as a county of the first class. At the same time, the Legislature, by L.1981, c 462, § 20, amended *N.J.S.A.* 18A:54-37 to substitute "latest federal decennial census" for "1970 federal census." Consequently, Bayonne remained the sole New Jersey municipality exempt from county-vocational-school tax payments.

The exemption statute, *N.J.S.A.* 18A:54-37, now reads:

> Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey Statutes, in any county of the first class having a population of not more than 700,000 according to the latest decennial census, each municipality included within a school district which has maintained for a minimum of 20 years a vocational educational program approved for the purposes of federal or State allotment of vocational funds by the Commissioner under the regulation of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.

To implement the mandate of *N.J.S.A.* 18A:54-37, Hudson County devised a two-tier tax system for assessing the county tax burden on its municipalities. The system, administered by defendant Hudson County Board of Taxation (HCBT), provided a higher rate (which included the costs of operating the county vocational school) for eleven of Hudson County's twelve municipalities, including plaintiff, Secaucus, and a lower rate

(which excluded the costs of operating the county vocational school) for Bayonne. The dual rate was necessary because appropriations for county vocational education must be assessed, levied, and collected in the same manner as general county appropriations pursuant to *N.J.S.A.* 18A:54-29.2. Lacking any statutory authorization, HCBT could not separate the county vocational-school component from the common purpose budgetary requirements of the county. Under the two-tier system, the other eleven Hudson County municipalities, by paying proportionally more tax than Bayonne, compensated for the revenue lost through Bayonne's exemption from the cost of maintaining HCVS. As the Appellate Division noted: "Put more bluntly, and more precisely, Hudson County struck two county tax rates for its municipalities, the lower one solely for Bayonne." 255 *N.J.Super.* at 668, 605 A.2d 1151.

The two-tier system of taxation, however, operated not only in the assessment of regular county taxes but also in the determination of what each Hudson County municipality had to pay in added and omitted assessments. As the trial court in the litigation below explained:

> On February 15, each year, municipalities must also pay to the county a share of the revenues derived pursuant to *N.J.S.A.* 54:4-63.1, *et seq.*, (added assessments of real estate), *N.J.S.A.* 54:4-63.12, *et seq.*, and *N.J.S.A.* 54:4-63.31, *et seq.*, (omitted assessments of real estate). These provisions prevent new properties constructed after the October 1 assessment date, or properties which were not included in the regular assessment list of October 1 for the tax year, from escaping taxation until the

> following year. Under *N.J.S.A.* 54:4-63.19, -63.38, the added or omitted property assessment list is multiplied by the county rate to calculate the sums due to the county for added and omitted taxes.
> *[Secaucus v. Hudson County Bd. of Taxation*, No. 094204-86W (Law Div. June 29, 1990).]

By applying its two-tier system of taxation to the added-and-omitted assessments list, HCBT afforded Bayonne the benefit of a lower rate, while imposing on the other Hudson County municipalities a higher rate. Exacerbating the perception of unfairness in the two-tier tax system was the fact that the revenues generated by the added and omitted assessments were applied only to general county operating expenses and were not separately allocated to HCVS.

Accordingly, on October 17,1986, Secaucus, as one of the eleven Hudson County municipalities subjected to the higher tax rate, brought a complaint in lieu of prerogative writs against Hudson County and HCBT. Secaucus initially challenged only the methodology by which HCBT calculated the two rates. Secaucus sought to have the county vocational school component excluded from the added and omitted assessments. By leave of the Appellate Division, Secaucus subsequently amended its complaint to include the claim that *N.J.S.A.* 18A:54-37 was unconstitutional as violating the special-legislation and uniformity provisions of the State Constitution. Bayonne was included as a necessary party.

Finding the effect of *N.J.S.A.* 18A:54-37 to be clearly discriminatory, the trial court ordered HCBT to adopt a single county tax rate, to debit Bayonne for its underpayment of county taxes, and to credit the eleven other municipalities for excess

payments. On the constitutional claims, the trial court determined that *N.J.S.A.* 18A:54-37 violated both the uniformity clause of the New Jersey Constitution, article VIII, section 1, paragraph 1, and the special legislation prohibition of article IV, paragraph 9, section 6. The trial court found a violation of the uniformity clause because *N.J.S.A.* 18A:54-37 granted a tax exemption to Bayonne based on the mere incidence of location, rather than on the use of its property. Applying the three-step special-legislation analysis of *Vreeland v. Bryne,* 72 *N.J.* 292, 300-01, 370 *A.2d* 825 (1977), the trial court also found the statute to be special legislation.

On August 31, 1990, this Court Ordered HCBT to comply with the trial court judgment requiring a single 1990 tax rate among all Hudson County municipalities, but stayed that part of the judgment requiring HCBT to credit and debit the Hudson County municipalities for prior years' payments under the two-tier tax system. The single Hudson County tax rate now in effect was computed for the 1990 tax year, pursuant to the Court's order.

The Appellate Division agreed with the trial court that *N.J.S.A.* 18A:54-37 violated the uniformity clause. The Appellate Division, however, applied an entirely different rationale. In its view, the lack of uniformity was caused "by excusing a taxpayer (Bayonne) from having to pay its proportionate share of the cost of an item in the budget of the taxing district (Hudson County)." 255 *N.J.Super.* at 669, 605 *A.2d* 1151. Because the uniformity clause requires that all real property "be taxed at the general rate of the taxing district in which the property is situated, for the use of such taxing district," the Appellate Division found that a uniform county tax rate as among the municipalities of a county is mandated by article VIII, section 1, paragraph 1. *Id.* at 668-69, 605 *A.2d* 1151. Having found *N.J.S.A.* 18A:54-37 unconstitutional under the uniformity clause, the Appellate Division did not reach

the special legislation question.

II

A.

We now consider whether *N.J.S.A.* 18A:54-37 is unconstitutional because it is special legislation or because it violates the uniformity clause under the New Jersey Constitution. In answering the constitutional question, we consider as a preliminary matter two issues: the standing of HCBT to address the constitutionality of the exemption statute and the standard for reviewing claims challenging the constitutionality of legislation.

Secaucus claims that HCBT lacks standing to urge the constitutionality of *N.J.S.A.* 18A:54-37. That to have standing a party must have "a sufficient stake and real adverseness with respect to the subject matter of the litigation" is well settled. *N.J. Chamber of Commerce v. N.J. Election Law Enforcement Commission,* 82 *N.J.* 57, 67, 411 *A.2d* 168 (1980). Additionally, "[a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision is needed for the purposes of standing." *Ibid.* By those criteria, HCBT clearly has standing. Indeed, HCBT's present position is not unlike that of the Bergen County Board of Taxation in *Township of Mahwah v. Bergen County Bd. of Taxation,* 98 *N.J.* 268, 486 *A.2d* 818, *cert. denied sub nom. Borough of Demarest v. Township of Mahwah,* 471 *U.S.* 1136, 105 *S.Ct.* 2677, 86 *L.Ed.2d* 696 (1985). In that case, the Court heard the Bergen County Board of Taxation's cross-appeal on the constitutionality of county tax rebate statutes. Like the situation in *Mahwah,* the decision here will affect how the county tax board calculates the municipalities' apportioned share of county taxes. County boards of taxation are regarded as state agencies with the

jurisdiction, authority, and responsibility over county taxes. *N.J.S.A.* 54:3-11; *see DeFeo v. Smith,* 17 *N.J.* 183, 188, 110 *A.2d* 553 (1955). As a state agency, HCBT will be affected by the determination of the constitutionality of the statute it is charged with enforcing. Significantly, HCBT has been involved in every step of this litigation, having been named by Secaucus as a defendant in both the original and amended complaints. Accordingly, we hold that HCBT has standing to be heard.

With respect to the standard for reviewing the constitutionality of State statutes, the Court will afford every possible presumption in favor of an act of the Legislature. *Holster v. Board of Trustees of Passaic County College,* 59 *N.J.* 60, 66, 279 *A.2d* 798 (1971). Where alternative interpretations of a statute are equally plausible, the view sustaining the statute's constitutionality is favored. *David v. Vesta Co.,* 45 *N.J.* 301, 212 *A.2d* 345 (1965); *In re Loch Arbor,* 25 *N.J.* 258, 135 *A.2d* 663 (1957); *see Edgewater Inv. Assocs. v. Borough of Edgewater,* 103 *N.J.* 227, 510 *A.2d* 1178 (1986). Only a statute "clearly repugnant to the constitution" will be declared void. *Newark Superior Officers Ass'n v. City of Newark,* 98 *N.J.* 212, 222-23, 486 *A.2d* 305 (1985).

Further, in the field of taxation, the Court has accorded great deference to legislative judgments. *McKenny v. Byrne,* 82 *N.J.* 304, 314, 412 *A.2d* 1041 (1980). The Court has recognized that absolute equality in taxation is a practical impossibility, *Borough of Totowa v. Passaic County Board of Taxation,* 5 *N.J.* 454, 464, 75 *A.2d* 874 (1950), and that absolute mathematical precision is not required. *Murnick v. Asbury Park* 95 *N.J.* 452, 471 *A.2d* 1196 (1984). Additionally, in constitutional challenges based on the special-legislation prohibition of article IV, "the burden is on the party challenging the constitutionality of the statute to demonstrate

clearly that it violates a constitutional provision." *Mahwah, supra,* 98 *N.J.* at 283, 486 *A.2d* 818.

No statute, however, can authorize an unconstitutional practice. *Township of West Milford v. Van Decker,* 120 *N.J.* 354, 357, 576 *A.2d* 881 (1990). Wherever a statute and the constitution come into conflict, the statute must give way. *Id.* at 364, 576 *A.2d* 881.

Accordingly, we must examine *N.J.S.A.* 18A:54-37 to see if it clearly and irremediably violates the constitutional provisions prohibiting special legislation, art. IV, § 7, ¶ 9, and mandating uniformity of taxation of real property within a taxing district, art. VIII, § 1, ¶ 1.

B.

The *New Jersey Constitution* provides that:

> 9. The Legislature shall not pass any private, special or local laws:
>
> * * * * * * * * *
>
> (6) Relating to taxation or exemption therefrom. [N.J. Const. art. IV, § 7, ¶ 9(6).]

As Justice Garibaldi observed in *Town of Morristown v. Woman's Club,* "the guiding principles of taxation as embodied in the constitution, requir[e] that taxation of all real property be imposed only by uniform rules and exemption be accomplished only by general laws." 124 *N.J.* 605, 612, 592 *A.2d* 216 (1991). *Town of Morristown* involved only a challenge under the uniformity

provision of article VIII. We need not resolve whether the "general law" requirement of article VIII and the prohibition on special legislation of article IV are functionally identical for the purposes of tax laws challenged as special legislation. Whatever the case, the second principle that Justice Garibaldi enunciated is relevant to an article IV special-legislation analysis, *i.e.*, exemptions to taxation shall be accomplished only by *general* laws.

The concept of special legislation "has been well established in this state for almost a century." *Town of Morristown, supra,* 124 *N.J.* at 622, 592 *A.2d* 216 (Clifford, J., dissenting). From a constitutional standpoint, a law is regarded as special legislation " 'when, by force of an inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes.' " *Ibid.* (quoting *Budd v. Hancock* 66 *N.J.L.* 133, 135, 48 *A.* 1023 (Sup.Ct.1901)); *see Kimball Hosp. v. Brick Township Hosp.*, 86 *N.J.* 429, 446, 432 A.2d 36 (1981).

In *Vreeland v. Byrne,* the Court established a three-part test to determine whether a statute constituted special legislation. As Justice Mountain described it:

> [T]he method of analysis is this: we first discern the purpose and object of the enactment. We then undertake to apply it to the factual situation presented. Finally we decide whether, *as so applied*, the resulting classification can be said to rest upon any rational or reasonable basis relevant to the purpose and object of the act.

[72 *N.J.* at 300-01, 370 *A.2d* 825 (emphasis added).]

Accordingly, we must first discern the purpose of *N.J.S.A.* 18A:54-37; then apply that purpose to the specific facts of the case before us — the support of municipal and county vocational schools; and finally, decide whether *N.J.S.A.* 18A:54-37, as it actually operates, represents a reasonable legislative classification.

In seeking a rational purpose for a statute under constitutional challenge, "the court is not limited to the stated purpose of the legislation, but should seek *any* conceivable rationale basis." *Mahwah, supra*, 98 *N.J.* at 286, 486 *A.2d* 818. Taken in a light most favorable to the constitutionality of the statute, two possible interpretations of *N.J.S.A.* 18A:54-37 on their face reveal a legitimate legislative purpose. First, *N.J.S.A.* 18A:54-37 may be conceived most generally as a tax relief statute designed to lessen the burden on those municipalities that maintain their own vocational education programs. On that view, the object of *N.J.S.A.* 18A:54-37 is to address the problem of double contribution by municipalities that have their own vocational programs to both a local and a county vocational program. Under that interpretation, *N.J.S.A.* 18A:54-37 could be analogized to programs like county health services, *N.J.S.A.* 18A:54-11, or county library services, *N.J.S.A.* 40:33-9, that address the problem of dual contributions by providing optional funding systems.

A second purpose of *N.J.S.A.* 18A:54-37 may be to promote the development of local, high-quality vocational educational programs within densely-populated communities. In achieving that objective, the statute would have the added benefit of reducing the strain on county vocational schools.

After careful scrutiny of the specific facts of this case and the

statute under challenge, how *N.J.S.A.* 18A:54-37 realizes either of those purposes is difficult to see.

In the first case, if alleviating the problem of double contribution for municipalities that maintain their own vocational programs is the real purpose of *N.J.S.A.* 18A:54-37, the population-density and longevity requirements of the statute make little sense. At least twenty municipalities within the state, and at least one other municipality within Hudson County (Kearny), maintain their own vocational-education programs. As Secaucus noted, to the extent that the burden from double contribution is not any less for municipalities that have maintained local vocational programs for *fewer* than twenty years, the longevity requirement of *N.J.S.A.* 18A:54-37 seems particularly ill-suited to the goal of tax relief.

In the second case, if the goal of *N.J.S.A.* 18A:54-37 is to encourage the development of high-quality vocational-education programs within densely-populated municipalities, thereby reducing the strain on county vocational schools, to exclude municipalities either in the most-populous counties, *i.e.* Essex and Bergen, or in less but densely-populated counties like Union and Middlesex, does not seem reasonable. Nonetheless, the statute excludes Essex and Bergen on the basis of their excessive populations (over 700,000), and excludes densely-populated Union and Middlesex counties because they are not designated first-class counties.

That "[a] classification based on population does not automatically render a law unconstitutional special legislation" is well settled. *Newark Superior Officers Ass'n, supra,* 98 *N.J.* at 225, 486 A.2d 818. This Court has recognized the rational "nexus between accountability and population." *Id.* at 225-26, 486 A.2d

818 (citing and explaining cases in which the Court has upheld population classifications as rationally related to a legitimate legislative purpose); *see also Mahwah, supra,* 98 *N.J.* 288-90, 486 A.2d 818 (citing and explaining cases in which Court has upheld population requirement against special-legislation challenges).

In *Mahwah, supra,* the Court considered a special legislation challenge to *N.J.S.A.* 54:4-5 (hereafter "the rebate statute") and what was then *N.J.S.A.* 54-4-5.2 (hereafter "the supplemental statute"). 98 *N.J.* at 271, 486 A.2d 818. The rebate statute, originally enacted in 1922,

> provided a rebate of a portion of a municipality's share of county taxes if the municipality were located in a first-class county with a population in excess of 800,000 and had within its borders 200 acres or more of land used and occupied by a state or county institution.
>
> [*Ibid.*]

The purpose and effect of the rebate statute was to reduce the burden imposed upon Cedar Grove, which acted as host municipality to the Essex county psychiatric hospital "without receiving any corresponding tax benefit." *Id.* at 275, 486 A.2d 818. In 1980, the Legislature had passed a supplemental statute that imposed a "grandfather clause" on the rebate statute's benefits. By the terms of the supplemental statute, only those municipalities that had qualified for the rebate statute prior to September 1980 could come within the scope of the rebate statute. *Id.* at 293, 486 A.2d 818. The effect of the supplemental statute was to guarantee that Cedar Grove would remain "the only municipality to ever qualify for the rebate." *Ibid.*

Appendix A

The Court declined to find that the rebate statute was unconstitutional special legislation based merely on the rebate statute's population requirements. *Id.* at 290, 486 A.2d 818. Observing that common sense dictated that "an institution (like a county psychiatric hospital) in a county with a larger population will likely be utilized by more people than a similar institution in a smaller county," *ibid.* the Court concluded that the costs to the host municipality of such an institution would be greater in a larger than in a smaller county. Accordingly, the Court found the population classification to have a reasonable basis.

In this case, we are cognizant of the fact that Hudson County is unique in terms of the density and urbanization of its population, having almost twice as many residents per square mile (12,108.1) as the next most densely-populated county, Essex County (6,701.7). From that fact, it is possible to conjecture that the Legislature had a special interest in encouraging the development of local vocational education programs in the State's most densely populated areas. Nevertheless, that possibility seems remote, if not illusory. That concern has never been advanced as a possible legislative purpose or concern. Further, from the perspective of making educational services available to as many students as feasible, the encouragement of excellent vocational schools by individual school districts would make as much sense for less densely-populated areas as those more densely-populated. However, as already noted, the particular limitations embodied in N.J.S.A. 18A:54-37 go well beyond population size and density.

The requirement that the local vocational program be in operation for at least twenty years — the so-called "longevity" requirement — works to exclude other municipalities in areas just as densely populated as Bayonne, from the benefit of the statute. To accept the classifications contained in *N.J.S.A.* 18A:54-37 as

having a rational basis, one must imagine that the Legislature had some reasonable ground for encouraging the development of local vocational programs only in the most-densely-populated county in the state with a total population below 700,000, *and* that the Legislature had reasonable grounds for concluding that only those programs in existence for at least twenty years were of sufficient quality to be worthy of financial encouragement through tax relief. Those conclusions seem to us to stretch credulity beyond reasonable limits.

The dissent finds the statute rational because it pursues a very different mode of analysis of the classifications embodied in the statute. First, the dissent disaggregates the population and longevity requirements. With respect to the twenty-year approval requirement, the dissent simply refuses to "second-guess" the legislature and finds the longevity requirement rational. *Post* at 513, 628 *A.2d* at 304. The dissent then finds the population requirements, if not rational, at least harmless because "[t]he list of approved vocational programs reveals that no municipality either in Bergen or Essex Counties maintains such a program." *Post* at 514, 628 *A.2d* at 304.

It is important to keep in mind, however, that when the dissent refers to "such" programs, it means approved vocational-education programs in *existence for at least twenty years.* Under the longevity term of the statute, a school district is required to have "maintained for a minimum of 20 years a vocational educational program approved for the purposes of *federal or* State allotment of vocational funds by the Commissioner of Education." *N.J.S.A.* 18A54-37 (emphasis added). As recognized by the Appellate Division, "almost every local school district has an approved education program." 255 *N.J. Super.* at 667, 605 *A.2d* 1151. In turn, almost every municipality in the state maintains a vocational education program approved for the purposes of federal

aid under *N.J.A.C.* 6:43-2. Were the population ceiling (700,000) to be excised from the statute, those municipalities in Bergen and Essex counties would still not qualify under the statute's classifications because their vocational-education programs have been in existence for less than twenty years.

When the dissent thus says that no municipalities in Bergen or Essex counties maintain "such" approved programs, what it means is that all approved vocational-education programs within those counties are excluded by the statute's longevity requirement. That is precisely the point. The interaction of the longevity and population requirements irrationally restricts the statute's classifications to exclude municipalities that, on any reasonable analysis, ought to come within the statute's purview.

An analysis of the history of *N.J.S.A.* 18A:54-37 further undermines the plausibility of interpreting the statute as a legitimate attempt to encourage local vocational programs in densely populated areas.

Ordinarily, the fact that *N.J.S.A.* 18A:54-37 was enacted more than twenty years ago and amended by the Legislature in *1981* would create a strong presumption in favor of its constitutionality. *Mahwah, supra,* 98 *N.J.* at 291, 486 *A.2d* 818. In the instant case, however, a careful examination of the legislative history of *N.J.S.A.* 18A:54-37 and the circumstances of its amendment in 1981, only reinforce the perception that the statute constitutes special legislation.

As noted earlier, *supra* at 487, 628 *A.2d* at 290, the original terms of what became *N.J.S.A.* 18A:54-37 would have achieved the broad and entirely rational purpose of tax relief for all those municipalities that operated their own vocational-education

programs. The bill was amended, however, to be directed toward a class of one: Bayonne. The special nature of the legislation was recognized by the Senate Education Committee itself, which described the legislation as a bill to "exempt the *City of Bayonne* from any assessment of taxes due to the cost of supporting the county vocational school in Hudson County." *supra* at 488, 628 *A.2d* at 291 (emphasis added).

When, in 1981, the population of Hudson County fell below 600,000, thus jeopardizing its status as a county of the first class, the Legislature responded by redefining county of the first class with new total population and population-density requirements. The population-density requirement had the effect of keeping Middlesex County, which by 1980 had a population larger than that of Hudson County, from becoming a county of the first class. At the same time it redefined a first-class county, the Legislature amended *N.J.S.A.* 18A:54-37 so that its population ceiling of 700,000 would track the most recent decennial census. The effect of those amendments was to continue to guarantee that only Bayonne would derive the benefit of the statute's exemption.

True, a statute is not unconstitutional as special legislation merely because its effect is limited to a particular municipality. *Mahwah, supra,* 98 *N.J.* at 285, 486 *A.2d* 818. Nevertheless, the classification by which a statute limits its effects must be grounded in a rational basis. *Ibid.* When a statute has the effect of addressing the needs of a particular community or serving a particular legislative purpose, the Court looks to, *inter alia,* whether "other municipalities could, and from time to time have, come within its scope." *Ibid.*

In that regard, we draw a comparison to *Mahwah.* Unlike that case, the Court is not now presented with reasonable population

requirements that invite the Court to "quibble by making comparisons to subjects slightly above or below the dividing line chosen by the Legislature." *Id.* at 291-92, 486 *A.2d* 818. Moreover, we note that in *Mahwah*, although the Court declined to invalidate the rebate statute based purely on the population classifications the statute imposed, the Court did strike down the supplemental statute that imposed a "grandfather clause" on those municipalities that could fall within the rebate statute's purview. *Id.* 293-94, 486 *A.2d* 818. We believe a strong analogy can be drawn between the grandfather clause in the supplemental statute invalidated in *Mahwah* and the longevity requirement embodied in *N.J.S.A.* 18A:54-37. In this case, even if one could justify rationally the total population and population-density requirements of *N.J.S.A.* 18A:54-37, we cannot conceive of a rational basis for excluding other municipalities that may satisfy the population requirements of *N.J.S.A.* 18A:54-37 on the basis of the fact that their vocational programs have not been approved by the State for at least twenty years.

The history of *N.J.S.A.* 18A:54-37 makes clear not only that the classifications embodied within it lacked a reasonable basis, but that no other municipality — partly due to the statute's subsequent amendment — has come within its scope or derived its benefit. Kearny, which implemented its vocational-education program in 1980, would come with the statute's scope in the year 2000. Were that to occur the statute would have been in operation almost three decades before a municipality other than Bayonne came within its scope.

Based on the foregoing analysis, we conclude that *N.J.S.A.* 18A:54-37, as it actually operates, does not represent a reasonable legislative classification. Accordingly, we find that *N.J.S.A.* 18A:54-37 violates the prohibition on special legislation of article

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IV, section 7, paragraph 9 of the New Jersey Constitution.

The dissent suggests that the Court sever the population ceiling from the statute, thus saving its constitutionality. *Post* at 514, 628 *A.2d* at 304. That sort of "judicial surgery" is warranted "if only a few of [an] Act's provisions may be severed without altering the Legislature's intended purpose." *Robinson v. Cahill*, 69 *N.J.* 449, 559, n. 20, 355 *A.2d* 129 (Pashman, J. dissenting). Accordingly, severance of the population requirement of *N.J.S.A.* 18A:54-37 would be justified only if "the legislative intent [of the statute] will be more nearly realized by exscinding this provision than by declaring the entire statute unconstitutional." *Vreeland, supra*, 72 *N.J.* at 301, 370 *A.2d* 825.

It is clear, however, that no such warrant exists in this case. At least twice in the statute's history, the Legislature was confronted with the opportunity of altering the scope of the statute's classifications so as to broaden its application. The first opportunity came at the time of the statute's original proposal. The second opportunity came with the publication of the 1980 federal census.

Each time the Legislature expressly declined those opportunities, acting affirmatively to keep the scope of the statute narrowed to a class of one — Bayonne.

In finding that the statute is unconstitutional as special legislation, we note, however, that *N.J.S.A.* 18A:54-37 is readily distinguished from statutes that allow municipalities to opt out of county services for which the municipality chooses to maintain a local program. Unlike those kinds of optional programs, such as county health or library services, *N.J.S.A.* 18A:54-37 does not afford tax relief to municipalities that operate local programs that

are duplicated by county-wide programs. Rather, as we have detailed above, *N.J.S.A.* 18A:54-37 unreasonably limits its scope with both total population, population-density, and longevity requirements. Accordingly, finding *N.J.S.A.* 18A:54-37 to be in violation of the article IV prohibition on special legislation does not at all impugn the constitutional validity of other statutes that provide exemptions from contributions to county expenditures for services already provided by municipal governments. The test, in every case, is whether the classifications embodied in a particular statute "rest upon a reasonable or rational basis relevant to the purpose and object" of the statute. *Vreeland, supra,* 72 *N.J.* at 301, 370 *A.2d* 825.

C.

Having found *N.J.S.A.* 18A:54-37 to be unconstitutional as special legislation, we need not reach the issue of whether the statute also violates the uniformity clause of article VIII. Nevertheless, because the Appellate Division decision raises important questions on the interpretation of the uniformity clause, we believe the following comments are in order.

Article VIII, the taxation article, of the New Jersey Constitution reads in relevant part:

> § 1(1)(a). Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such property shall be taxed at the general tax rate of

> the taxing district in which the property is situated, for the use of such taxing district.
>
> * * * * * * * * *
>
> 2. Exemption from taxation may be granted only by general laws. Until otherwise provided by law all exemptions from taxation validly granted and now in existence shall be continued. Exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit.

The first paragraph quoted above, article VIII, section 1, paragraph 1(a), is most commonly called the "uniformity clause." *See e.g., New Jersey State League of Municipalities v. Kimmelman,* 105 *N.J.* 422, 522 *A.2d* 430 (1987); *Robinson, supra,* 69 *N.J.* at 473, 355 *A.2d* 129. The second paragraph the Court has termed the "exemption clause." *See Morristown, supra,* 124 *N.J.* at 612, 592 *A.2d* 216.

In *New Jersey State League of Municipalities,* Justice O'Hern provided what is to date the Court's most thorough discussion of the history of the uniformity clause. There, Justice O'Hern noted "two distinct components" to the uniformity clause: (1) all property must be taxed by the State according to general laws and uniform rules, and (2) all real property must be assessed at the same standard of value and at the general rate of the taxing district for its

use. 105 *N.J.* at 427-28, 522 *A.2d* 430. Regardless of the political subdivision within New Jersey that levies them, all taxes are State taxes. *Id.* at 429, 522 *A.2d* 430. Exceptions to the provisions of the uniformity clause are delineated in the exemption clause.

The Court, however, has declined to take the listing of the exemption clause literally (i.e, confined to property used exclusively for religious, educational, charitable or cemetery purposes, by non-profit organizations), and instead has looked to "whether the exemption is based on a permissible classification and if so, whether the classification serves a public purpose." *Morristown, supra*, 124 *N.J.* at 614, 592 *A.2d* 216. Accordingly, any determination of whether a statute violates article VIII of the State Constitution must first look to whether real property is being taxed at nonuniform rates within a taxing district; and, if so, whether the property exempted from taxation falls within the constitutionally recognized exceptions of the exemption clause.

Both the trial court and the Appellate Division found *N.J.S.A.* 18A:54-37 to have violated the uniformity clause, although for different reasons. *supra*, 255 *N.J.Super.* at 669, 605 *A.2d* 1151. On the one hand, the trial court saw the statute as exempting Bayonne property owners from that portion of the Hudson County property tax used to support HCVS. Finding no rational basis for the population and longevity requirements of the statute, the trial court concluded that the exemption was based on the "mere incidence of location." Relying on *League of Municipalities, supra,* 105 *N.J.* at 429, 522 *A.2d* 430, it held that the statute violated the uniformity clause. The trial court believed that an exemption from taxation could be justified only on the basis of the *use* of the property.

The Appellate Division, on the other hand, did not see the statute as exempting Bayonne's real property from taxation. 255

N.J. at 669, 605 *A.2d* 1151. The Appellate Division reasoned that "we are not dealing with an exception of real property from taxation; we are dealing with a lack of uniformity caused by excusing a taxpayer (Bayonne) from having to pay its proportionate share of the cost of an item in the budget of the taxing district (Hudson County)." *Ibid.* On those grounds, the Appellate Division concluded that *N.J.S.A.* 18A:54-37 violated the uniformity clause.

Intrinsic to that holding by the Appellate Division was the conclusion that a county is a "taxing district" for the purposes of article VIII. For that conclusion, the Appellate Division relied on this Court's holding in *Robinson v. Cahill,* 62 *N.J.* 473 (1973). In *Robinson*, the Court considered an equal-protection challenge to the financing of public elementary and secondary schools. In resolving that issue, the Court also considered whether the uniformity clause requires a tax levied to finance public schools to fall uniformly on all taxable property throughout the state. In holding that a property tax designed to finance a State service must fall on all taxable property within the state, the Court held: "[I]f the responsibility for the State function is assigned to local government, the local tax must fall uniformly upon all taxable property within the *county or the municipality.*" *Id.* at 503. The Appellate Division understood that statement from *Robinson* to demand that "[t]he clause applies to all levels of state government, including counties." 255 *N.J. Super.* at 668, 605 A.2d 1151.

A careful review of the history of article VIII and the decisions of our courts on the uniformity clause leaves us with grave reservations about that conclusion.

The definition of "taxing district" as a political division "less than a county" was well established by both the Legislature and the

judiciary at the time the 1947 Constitutional delegates began their work. The Legislature, by *L.*1918, *c.* 236, defined "taxing district" (as that term was then used in the tax assessment-collection statute) as "every political division *less than a county* whose inhabitants, governing body or officers have the power to levy taxes." (emphasis added). That definition of "taxing district" is now codified at *N.J.S.A.* 1:1-2.

The 1918 Legislative definition of "taxing district" as less than a county was itself merely a codification of a definition that had been promoted by courts as early as 1907. At that time, the Supreme Court in *Essex County Park Commission v. West Orange,* 75 *N.J.L.* 376, 379, 67 *A.* 1065 (Sup.Ct.1907), *rev'd on other grounds,* 77 *N.J.L.* 575, 578, 73 *A.* 511 (E. & A.1909), analyzed the words of a 1903 supplemental tax law that exempted "the property * * * of the State of New Jersey and of the respective counties, school districts and taxing districts, when used for public purposes." The court held that

> [s]ince in this state taxing districts are coterminous with the political divisions generally known as municipal corporations . . . the words "all lands the property of any taxing district," as used in the act, import the ownership of the property by some municipal corporation whose territory is *less extensive* than a county.

The Court of Errors and Appeals later reaffirmed the principle that "[a] county is not a taxing district." 77 *N.J.L.* at 578, 73 *A.* 511.

During the 1947 Constitutional Convention, the term "taxing district" was rarely mentioned and never defined on the record.

E.g., 5 Convention Record 773, 854-55. Only once were the words "taxing districts" and "counties" mentioned together, and here a distinction was drawn between the two. That occurred when a representative of the New Jersey Committee for Constitutional Revision complained about the "utter lack of equalization, not only between taxing districts and counties, but between individual properties in the same taxing district." 5 *id.* at 740. The history of the 1947 tax clause thus indicates that the Constitutional Convention delegates commonly understood the phrase "taxing district" to be a municipality.

More recent caselaw supports the contention that the term "taxing district," as used within the uniformity clause, refers to municipalities. In *League of Municipalities, supra,* for example, Justice O'Hern concluded that the uniformity clause was written "with the apparent purpose of providing that real property dedicated to *municipal tax purposes* should never be taxed at an unequal burden." 105 *N.J.* at 436, 522 *A.2d* 430. (emphasis added). See also *Sea Bright Borough v. Department of Educ.,* 242 *N.J.Super.* 225, 228, 576 *A.2d* 331 (App. Div.) (holding constitutional requirement of uniform tax rate not applicable to allocation of costs among constituent members of regional school district), *cert. denied,* 127 *N.J.* 320, 604 *A.2d* 596 (1990); *Township of Princeton v. New Jersey Dep't of Educa.,* 163 *N.J.Super.* 389, 397, 394 *A.2d* 1240 (App.Div.1978) (same).

We should also note that even *Robinson,* the case on which the Appellate Division relied for its conclusion that a county was a taxing district, when describing the purpose of the uniformity clause a few pages after the dicta quoted by the Appellate Division stated that the purpose of the clause "was to assure that all taxable property *within a municipality* shall bear the same share of the tax burden of that municipality." 62 *N.J.* at 505 (emphasis added).

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III

In holding *N.J.S.A.* 18A:54-37 unconstitutional as special legislation in violation of article IV, section 7, paragraph 9(6), we are presented with the question of appropriate relief from the two-tiered system of county taxation that was used to implement the tax exemption statute.

In its original complaint, Secaucus challenged only the application of the two-tiered system of taxation, by which HCBT implemented *N.J.S.A.* 18A:54-37, to the added and omitted assessments. As the Appellate Division explained:

> Secaucus contended only that there was no need to apply the upper-tiered rate when taxing added and omitted assessments because that levy was made after the county vocational school district budget had been fully funded by the regular tax levy for that year.
>
> [255 *N.J.Super.* at 670-71, 605 *A.2d* 1151.]

On April 16,1987, the trial court directed that taxes collected from added and omitted assessments be used to reduce the vocational-school budget. The purpose of that order was to provide a credit to the municipalities that paid the upper-tier tax imposed by HCBT. Subsequently, Secaucus was given leave to amend its complaint to allege that *N.J.S.A.* 18A:54-37 was unconstitutional and to join other necessary parties. The matter was reversed and remanded to the trial court.

In its June 29, 1990, decision, the trial court granted relief to Secaucus and "similarly situated Hudson County municipalities by

application of excess two-tiered payments to the [HCVS] budget commencing with the year subsequent to the filing of the original complaint in 1986." The trial court granted full relief from *N.J.S.A.* 18A:54-37 by the elimination of the two-tiered county rate in 1990. Thus the remedy ordered by the trial court incorporated the relief granted Secaucus and similarly situated municipalities for the period extending from April 1986 (the filing of the original complaint) to May 1988 (the date on which Secaucus first raised constitutional issues in its amended complaint).

Bayonne urges that should the statute be declared invalid, any financial relief to be granted to Secaucus and similarly-situated municipalities should relate only to the 1989 tax year and thereafter. The partial remedy ordered by the trial court, which the Appellate Division affirmed, is deemed by Bayonne to be impermissible retroactive relief.

The Appellate Division rightly rejected that argument. 255 *N.J.Super.* at 670-71, 605 *A.2d* 1151. The partial judgment of the trial court, as the Appellate Division noted, "simply preserves the relief for that period given the non-Bayonne municipalities in the first judgment. That relief is not retroactive to the complaint." *Id.* at 671, 605 *A.2d* 1151.

Accordingly, we affirm the judgment of the Appellate Division that HCBT should debit Bayonne and credit the remaining Hudson County municipalities the appropriate added and omitted assessments for the period from 1986 to May 27,1988, and for the 1989 tax year. To ease the burden on Bayonne, we modify the Appellate Division decision to direct HCBT to calculate the appropriate debits and credits and implement them on a pro-rated basis over a reasonable period of time. We further affirm the elimination of the two-tiered Hudson County tax rate that was ordered in 1990.

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STEIN, J., dissenting.

In enacting *N.J.S.A.* 18A:54-37 the Legislature apparently was attempting to spare the City of Bayonne financial responsibility for a vocational school its students would not attend. Bayonne has maintained its own high-quality vocational-educational program since 1931. For Bayonne students, the Hudson County vocational program, established in 1972, was a duplication of effort; for Bayonne taxpayers, it was a duplication of expense.

By concluding that *N.J.S.A.* 18A:54-37 offends the constitutional prohibition on special legislation relating to taxation, the majority unnecessarily interferes with the Legislature's authority to balance competing municipal interests. Because the majority overlooks the well-established principles governing this Court's consideration of special legislation, I dissent from so much of the Court's judgment as holds the statute to be unconstitutional special legislation. I would uphold the validity of the statute.

I.

N.J.S.A. 18A:54-37 provides:

> Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey Statutes, in any county of the first class having a population of not more than 700,000 according to the latest federal decennial census, each municipality included within a school district which has maintained for a minimum of 20 years a vocational education

> program approved for the purposes of federal or State allotment of vocational funds by the Commissioner of Education under the regulation of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.

Plaintiffs allege that that statute violates the constitutional mandate that "[t]he Legislature shall not pass any private, special or local laws: * * * Relating to taxation or exemption therefrom." *N.J. Const.* art. IV, 7, ¶ 9(6). The principles generally applicable to challenges addressed to the constitutionality of statutes likewise guide our consideration of a claim that a statute violates the special legislation prohibition.

That "[a] statute is presumed to be constitutional and will not be declared void unless it is clearly repugnant to the Constitution," *Newark Superior Officers Ass'n v. City of Newark*, 98 *N.J.* 212, 222, 486 *A.2d* 305 (1985), is well-established. When a statute is susceptible of more than one interpretation, courts favor an interpretation sustaining its constitutionality. *In re Loch Arbour*, 25 *N.J.* 258, 264-65, 135 *A.2d* 663 (1957). Furthermore, a party challenging the validity of a statute under the special legislation prohibition of article IV has the burden of demonstrating clearly the constitutional violation. *Newark Superior Officers Ass'n, supra*, 98 *N.J.* at 222, 486 *A.2d* 305.

In *Vreeland v. Byrne*, 72 *N.J.* 292, 298-301, 370 *A.2d* 825 (1977), we established a three-part test to determine whether a statute is unconstitutional special legislation. We first consider the purpose of the law in question. Next, we apply the law to the factual

context to determine whether exclusions from the statute's applications can be identified. Finally, we determine whether a rational basis exists that is related to the object of the statute on which the exclusion or classification may rest. *Ibid.* In ascertaining whether such a rational basis exists, we are not "limited to the stated purpose of the legislation, but should seek *any* conceivable rational basis." *Township of Mahwah v. Bergen County Bd. of Taxation*, 98 *N.J.* 268, 286, 486 *A.2d* 818, *cert. denied sub nom. Borough of Demarest v. Township of Mahwah*, 471 *U.S.* 1136, 105 *S.Ct.* 2677, 86 *L.Ed.2d* 696 (1985).

In *Vreeland, supra*, that test guided our consideration of the validity of a statute that increased the salaries of Associate Justices of the Supreme Court but denied that increase to any member of the Legislature who might be appointed to the Court after enactment of the salary increase and during the term for which he or she had been elected to serve in the Senate or General Assembly. The Court first determined that the sole purpose of the statute was to increase judicial salaries. 72 *N.J.* at 298-99, 370 *A. 2d* 826. The Court then inquired whether "there are persons similarly situated to those embraced within the act, who, by the terms of the act, are excluded from its operation." *Id.* at 299, 370 *A.2d* 825. Any member of the Legislature who might succeed to a vacancy on the Court was excluded by the terms of the statute. *Ibid.* In considering whether some rational basis existed for that exclusion, the Court concluded that "[i]t would be fatuous to suggest that distinctions exist among the Associate Justices of the Court such as to justify a salary differential." *Id.* at 300, 370 A.2d 825. Having found no rational basis for the exclusion, and concluding that "the legislative intent [would] be more nearly realized by exscinding this provision than by declaring the entire statute unconstitutional," *id.* at 301, 370 *A.2d* 825, the Court excised the arbitrary classification from the statute. *Ibid.*

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In Newark Superior Officecs Ass 'n, supra, 98 *N.J.* 212, 486 *A.2d* 305, we applied the *Vreeland* test to a statute that permitted mayors of first-class cities having a "Mayor Council Plan C" form of government to appoint police chiefs to unclassified civil service positions. We first determined that the object of the legislation was to provide for greater cooperation between a police chief and the administration of cities of the first class. *Id.* at 224, 486 *A.2d* 818. We then observed that the statute was applicable only to Newark and Jersey City and that the population requirement of the statute acted to exclude all other cities. *Ibid.* Acknowledging the nexus between accountability and population, and drawing on earlier judicial recognition of the validity of population classifications, we concluded that the exclusions created by the statute were rationally based. *Id.* at 225-28, 486 A.2d 818.

We explained in *Newark Superior Officers Ass'n* that "in deciding whether an act is special or general legislation, the determining factor is what is excluded and not what is included." *Id.* at 223, 486 A.2d 818. We also emphasized our focus on statutory exclusions in *Paul Kimball Hospital, Inc. v. Brick Township Hospital, Inc.*, 86 *N.J.* 429, 432 *A.2d* 36 (1981), in which we observed that "the particular determinant of a special law is the appropriateness of the objects which it excludes." *Id.* at 445, 432 *A.2d* 36. The principles generally applicable to equal protection analysis similarly are applicable to a consideration of the propriety of a statutory exclusion. *Id.* at 445, 432 *A.2d* 36. Thus, we noted in *Paul Kimball Hospital* that

> the Legislature has wide discretion in determining the perimeters of a classification, distinctions may be made with substantially less than mathematical exactitude, and an adequate factual basis for the legislative

> judgment is presumed to exist. We must also be mindful of the strong presumption in favor of constitutionality, and the traditional judicial reluctance to declare a statute void, a power to be delicately exercised unless the statute is clearly repugnant to the Constitution.
>
> [*Id.* at 446-47, 432 A.2d 36 (citations omitted).]

Our adjudication of a special-legislation challenge must proceed in accordance with those principles. Generally, we uphold the constitutionality of a statute unless the party challenging the statute can demonstrate that no rational basis exists to support the exclusionary classification. *Newark Superior Officers Ass'n, supra,* 98 *N.J.* at 222-23, 486 *A.2d* 305.

II.

The object of *N.J.S.A.* 18A:54-37 is threefold. First, the statute spares municipalities that maintain a vocational program that has been approved for federal or State funding for at least twenty years and are located in large, densely-populated counties the financial burden of contributing to the funding of a county vocational program. In turn, that exemption serves as an incentive to those municipalities to preserve the quality of their vocational programs and to continue their operation. Finally, the availability to municipal residents of a high-quality vocational program renders them less likely to attend a county vocational program. Their attendance at the local vocational school reduces to some extent the demand for admission to a vocational-school program operated by a first-class county.

We next consider which, if any, municipalities are excluded

from the statute's scope and whether that exclusion is rationally based. The statute requires that in order to be eligible for the exemption, a municipality must maintain a vocational program that is approved for State or federal funding. Funding may be withheld from local vocational programs that do not meet the standards established by the State Board of Education and the United States Department of Education. *See generally N.J.A.C.* 6:43-2.1 to 3.19. Unquestionably, a rational basis existed for the Legislature to have selected only those municipalities with comprehensive, regulated vocational programs to be included in the class exempted from participating in the funding of county vocational programs.

Further emphasizing the importance of vocational programs of established quality, the statute also requires that the program have been in existence for at least twenty years. That limitation necessarily excludes from the scope of *N.J.S.A.* 18A:54-37 all vocational-school programs that have been operating for fewer than twenty years. Surely, the Legislature could have designated a period shorter than twenty years as the standard for assuring that a vocational-school program is sufficiently well-established to merit the tax exemption for its municipality, but we need not second-guess the rational legislative decision that only programs operating twenty years or more demonstrate the required measure of quality and durability.

The statute also excludes from the class any municipality not located in a first-class county. Bergen, Essex, and Hudson are the only first-class counties in New Jersey. Thus, only municipalities in those counties are eligible for the *N.J.S.A.* 18A:54-37 exemption. First-class status is determined by the population and density of the county. As noted earlier, "A classification based on population does not automatically render a law unconstitutional

special legislation." *Newark Superior Officers Ass'n, supra,* 98 *N.J.* at 225, 486 *A.2d* 305. Because first-class counties have the largest population and the largest vocational-student population, the potential for overcrowding of county-vocational programs may be greater in first-class than in other counties, arguably prompting the Legislature to focus its attention on encouraging municipal vocational-school programs in first-class counties. Although a need for municipally-operated vocational schools may exist in other than first-class counties, we should not condemn as irrational the Legislature's determination to restrict the tax exemption only to municipalities in first-class counties. *See Mahwah, supra,* 98 *N.J.* at 289-90, 486 *A.2d* 818 (emphasizing that "in population classification cases, legislative bodies may undertake the progressive resolution of problems dealing first with those aspects that are most pressing").

The classifications thus far described narrow eligibility of municipalities to those located in a first-class county that have maintained an approved vocational program for at least twenty years. The list of approved vocational programs reveals that no municipality either in Bergen or Essex Counties maintains such a program. Bayonne has maintained its program for over twenty years.

N.J.S.A. 18A:54-37 is further limited to municipalities in first-class counties with a population of not more than 700,000. That limitation does not exclude any municipality from the benefits of the statute because no municipality in a first-class county with a population exceeding 700,000 has maintained an approved vocational program for twenty years or more. The population of Hudson County is less than 700,000. Because we look to what is excluded and not what is included, we need not determine the rationality of the population cap because it has no effect. As noted

in *Mahwah, supra,* "While we might not agree that the population line should have been drawn where it has been, we submit that that determination is a legislative function subject to many considerations beyond the purview of this Court." 98 *N.J.* at 291, 486 *A.2d* 818; *see also State ex rel. Owens v. Fury,* 55 *N.J.L.* 1, 25 *A.* 934 (S.Ct.1892) (upholding statutory classification that excluded all cities with populations below 50,000 or above 100,000).

Even if the population ceiling were to exclude a municipality that is otherwise similarly situated, the Court could invalidate that ceiling and sever it from the balance of the statute, rather than conclude that the statute is unconstitutional as special legislation. Because the 700,000 population ceiling excludes no qualifying municipalities from the statute's coverage, the Legislature clearly would prefer its excision to complete invalidation of the exempting statute. *See Mahwah, supra,* 98 *N.J.* at 294-95, 486 *A.2d* 818 (preserving statute's constitutionality by severing grandfather clause that would render statute special legislation); *Vreeland, supra,* 72 *N.J.* at 301, 370 A.2d 825 (finding legislative intent more nearly recognized by excising irrational statutory classification than by declaring statute unconstitutional).

The rationally-based classifications in *N.J.S.A.* 18A:54-37 operate to exclude all municipalities except Bayonne. That a statute operates in favor of only one municipality does not render that statute invalid. *Mahwah, supra,* 98 *N.J.* at 285, 486 *A.2d* 818. When a statute addresses the needs of a specific community, the Court should consider whether "other municipalities could, and from time to time have, come within its scope." *Ibid.* Other municipalities may become eligible for the exemption provided by *N.J.S.A.* 18A:54-37; for example, Kearny will be eligible for the statutory exemption in the year 2000.

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III.

The majority concludes that "*N.J.S.A.* 18A:54-37, as it actually operates does not represent a reasonable legislative classification." *Supra* at 501, 628 *A.2d* at 298. In reaching that conclusion, the majority overlooks the direction of *Newark Superior Officers Ass'n, supra,* 98 *N.J.* at 222, 486 *A.2d* 305, that courts should not substitute their judgment for that of the Legislature in determining whether a legislative classification is rational. "If we can conceive of any reason to justify the classification, the statute will be upheld." *Id.* at 227, 486 *A.2d* 305. The majority offers several justifications for the statutory classifications. For example, the majority states that "it is possible to conjecture that the Legislature had a special interest in encouraging the development of local vocational education programs in the State's most densely-populated areas." *Supra* at 497, 628 *A.2d* at 296. Nevertheless, the majority concludes that that possibility is remote. *Ibid.* Our prior holdings emphasize, however, that if "*any* conceivable rational basis," *Mahwah, supra,* 98 *N.J.* at 286, 486 *A.2d* 818, exists to justify a statutory classification, the Court must uphold that statute. *Id.* at 285-86, 486 *A.2d* 818; *Vreeland, supra,* 72 *N.J.* at 301, 370 *A.2d* 825. As we explained in *Newark Superior Officers Ass'n, supra:*

> Ultimately, the generality or speciality of a statute becomes a question of reasonableness. There is no general rule to distinguish a reasonable from an unreasonable classification, the question being a practical one varying with the facts in each case. As stated previously, where the question of reasonableness is fairly debatable, courts will uphold the classification. The burden of

> showing that the classification is not reasonable is upon the party attacking the statute. If we can conceive of any reason to justify the classification, the statute will be upheld.
>
> [98 *N.J.* at 227, 486 *A.2d* 305]

Because I believe that the reasonableness of the classifications in *N.J.S.A.* 18A:54-37 are, at the very least, "fairly debatable," I would uphold the validity of the statute.

For modification and affirmance — Chief Justice WILENTZ and Justices HANDLER, CLIFFORD, POLLOCK and GARIBALDI—5.

For reversal — Justices STEIN and O'HERN—2.

APPENDIX B — ORDER OF THE SUPREME COURT OF NEW JERSEY FILED SEPTEMBER 23, 1992

SUPREME COURT OF NEW JERSEY
C-197 September Term 1992
35,245

TOWN OF SECAUCUS,

Plaintiff-Respondent,

v.

HUDSON COUNTY BOARD OF TAXATION, et al.,

Defendants-Petitioners,

and

CITY OF BAYONNE,

Defendant-Respondent.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6663-89 and A-311-90 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted. See, also, C-198-92.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 22nd day of September, 1992.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX C — ORDER OF THE SUPREME COURT OF NEW JERSEY FILED SEPTEMBER 22, 1992

SUPREME COURT OF NEW JERSEY
C-198 September Term 1992
35,245

TOWN OF SECAUCUS,

Plaintiff-Respondent,

v.

HUDSON COUNTY BOARD OF TAXATION, et al.,

Defendant-Respondent,

and

CITY OF BAYONNE,

Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6663-89 and A-311-90 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted; and it is further

ORDERED that the stay of the calculation of debits and credits for prior years' tax payments shall remain in effect until further Order of the Court; and it is further

ORDERED that the remainder of the Order of the Court dated September 18, 1992, is vacated.

Appendix C

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 22nd day of September, 1992.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX D — OPINION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED APRIL 21, 1992

605 A.2d 1151

TOWN OF SECAUCUS, PLAINTIFF-RESPONDENT, v. HUDSON COUNTY BOARD OF TAXATION, COUNTY OF HUDSON, BOROUGH OF EAST NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWNSHIP OF NORTH BERGEN, CITY OF UNION CITY, TOWNSHIP WEEHAWKEN AND TOWN OF WEST NEW YORK, DEFENDANTS-RESPONDENTS, AND CITY OF BAYONNE, DEFENDANT-APPELLANT.

TOWN OF SECAUCUS, PLAINTIFF-RESPONDENT, v. HUDSON COUNTY BOARD OF TAXATION, DEFENDANT-APPELLANT, AND COUNTY OF HUDSON, CITY OF BAYONNE, BOROUGH OF EAST NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWN OF NORTH BERGEN, CITY OF UNION CITY, TOWN OF WEEHAWKEN AND TOWN OF WEST NEW YORK, DEFENDANTS-RESPONDENTS.

Superior Court of New Jersey
Appellate Division

Argued March 18, 1992 — Decided April 21, 1992.

Before Judges BRODY, MUIR, Jr. and LANDAU.

F. Gerald Fitzpatrick, Law Director, City of Bayonne, argued the cause for appellant City of Bayonne.

Appendix D

Margaret A. Holland, Deputy Attorney General, argued the cause for appellant Hudson County Board of Taxation (*Robert J. Del Tufo,* Attorney General, attorney; *Mary C. Jacobson,* Deputy Attorney General, of counsel; *Margaret A. Holland,* on the brief).

Frances C. Holland argued the cause for respondent Town of Secaucus (*Holland & Holland,* attorneys; *Frances C. Holland,* on the brief).

Koch, Koch & Bennett, attorneys for respondent Town of Kearny (*Norman A. Doyle, Jr.,* on the brief).

Respondents, Borough of East Newark, Town of Guttenberg, Town of Harrison, City of Hoboken, City of Jersey City, Township of North Bergen, City of Union City, Township of Weehawken and Town of West New York, relied on brief submitted by respondent Town of Secaucus.

The opinion of the court was delivered by

BRODY, J.A.D.

The main issue in these appeals, which we now consolidate, is whether *N.J.S.A.* 18A:54-37 (the statute) violates the New Jersey Constitution. The statute has the effect of exempting the taxpayers of only the City of Bayonne from contributing to the support of their county vocational school. The trial judge entered a summary judgment declaring that the statute violated the New Jersey Constitution's tax uniformity and special legislation clauses. We agree that the statute violates the tax uniformity clause, but not for the reason given by the judge.

The statute provides:

Appendix D

> Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey Statutes, in any county of the first class having a population of not more than 700,000 according to the latest federal decennial census, each municipality included within a school district which has maintained for a minimum of 20 years a vocational education program approved for the purposes of federal or State allotment of vocational funds by the Commissioner of Education under the regulation of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district. [*N.J.S.A.* 18A:54-37.]

Twenty counties have approved county vocational schools and almost every local school district has an approved vocational education program. The statute's tax exemption (exemption), however, is available only to municipalities in Hudson County, one of three first-class counties. It is not available to municipalities in the other first-class counties, Essex and Bergen, because the population of each of those counties exceeds 700,000. The exemption is presently available only to Bayonne because its approved vocational education program is the only one in Hudson County that has been maintained for twenty or more years.

To accommodate the exemption, Hudson County adopted a so-called "two-tiered" county tax rate. Bayonne paid county taxes at the lower tier because it was not taxed to fund the county vocational school district. The other Hudson County

municipalities paid county taxes at the higher tier because their tax included the cost of the county vocational school district. Put more bluntly, and more precisely, Hudson County struck two county tax rates for its municipalities, the lower one solely for Bayonne.

The Constitution's tax uniformity clause provides in relevant part:

> 1. (a) Property shall be assessed for taxation under general laws and by uniform rules. *All real property* assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such real property *shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.* [Emphasis added.]
>
> * * * * * * * * *
>
> 2. Exemption from taxation may be granted only by general law. Until otherwise provided by law all exemptions from taxation validly granted and now in existence shall be continued. Exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit.

Appendix D

N.J. Const. of 1947 art. VIII, § 1, paras. 1 and 2. The clause applies to all levels of state government, including counties. *Robinson v. Cahill,* 62 *N.J.* 473, 503, 303 *A.2d* 273 (1973), *cert. denied,* 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L.Ed.2d* 219 (1973) ("... [I]f the responsibility for the State function is assigned to local government, the local tax must fall uniformly upon all taxable property within the county or the municipality.")

"*Art.* VIII, § I, *par.* 1, plainly requires the application of the *same* standard of value and the *same* rate of tax, to all real property taxable for local use." *Switz v. Kingsley,* 37 *N.J.* 566, 585, 182 *A.2d* 841 (1962). (Emphasis in original.) Respecting the mandate that there be the same standard of value in the taxing district, the tax uniformity clause adds "except as otherwise permitted herein." However, there is no exception respecting the mandate that there be the same rate of tax in the taxing district.

N.J.S.A. 18A:54-37 violates the tax uniformity clause because it compels Hudson County to apply a rate of tax to Bayonne that differs from the rate it applies to its other municipalities.

We differ with the trial judge's reasoning because he saw the constitutional violation in terms of giving favored treatment to Bayonne based on "the mere incidence of location," rather than on the use of its property, citing *New Jersey League of Municipalities v. Kimmelman,* 105 *N.J.* 422, 429, 522 *A.2d* 430 (1987). The *League* Court explained how to reconcile the two apparently conflicting paragraphs of the tax uniformity clause, the first requiring tax uniformity and the second permitting exemptions from taxation. It held that the tax uniformity clause may sometimes permit a statute to exempt real property from tax assessment based upon its use, but not upon the status of its owner or its location.

Here, the statute provides that a qualified municipality "shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district." Although it uses the word "exempt," the statute does not exempt Bayonne's real property from taxation. Rather, it reduces Bayonne's county tax rate by excusing it from having to fund the county vocational school district. Thus we are not dealing with an exemption of real property from taxation; we are dealing with a lack of uniformity caused by excusing a taxpayer (Bayonne) from having to pay its proportionate share of the cost of an item in the budget of the taxing district (Hudson County).

Because the statute violates the tax uniformity clause we need not discuss whether it also violates the constitutional prohibition against special legislation. *N.J. Const. of 1947* art. IV, § 7, para. 9. The overriding consideration in this appeal is that because of the constitutional mandate that there be a uniform county tax rate, the Legislature may not excuse a municipality from paying county taxes that fund a county facility even though the facility is not used by its citizens — just as the Legislature may not excuse an individual taxpayer from paying local taxes to fund a public school district even though the public school is not used by the taxpayer's children. *Cf. United States v. Lee*, 455 *U.S.* 252, 102 *S.Ct.* 1051, 71 *L.Ed.2d* 127 (1982) (Religion Clause of United States Constitution does not excuse Old Order of Amish from being taxed to fund federal social security system even though Amish religion requires Amish to maintain private system of social security and forbids its adherents from accepting federal social security benefits).

On another point, Bayonne contends that the trial judge erroneously provided "retroactive" relief. The point is not separately argued and the argument, which we reject, is at best terse. After declaring the statute unconstitutional, the judgment directs that a single county tax rate be struck for all Hudson County

municipalities beginning with the year 1990. It also orders that adjustments be made for the prior years that span the course of this litigation. Bayonne does not question the substantive correctness of those adjustments.

Secaucus first raised the constitutional argument in the trial court when it moved to amend its complaint on May 27, 1988. The judgment provides that a full adjustment among the municipalities from that date "be set forth in the 1990 Hudson County Abstract of Ratables to be adopted by the Hudson County Board of Taxation." That relief is not retroactive to the amended complaint.

The original complaint, filed October 17, 1986, challenged the "two-tiered" tax rate as it was applied to the collection of the county tax on added and omitted assessments affecting the 1986 county budget. Secaucus contended only that there was no need to apply the upper-tier rate when taxing added and omitted assessments because that levy was made after the county vocational school district budget had been fully funded by the regular tax levy for that year. The trial judge agreed and in a judgment entered April 16, 1987, ordered that the County apply the taxes collected from added and omitted assessments to reduce the following year's county vocational school district budget, thereby giving the municipalities that paid at the higher rate a credit against the upper-tier levy for the following year. An appeal followed.

It was not until it fashioned its arguments on that appeal that Secaucus challenged the constitutionality of using a two-tiered tax rate to collect county taxes. In deciding the appeal, we concluded that the constitutional issue should be raised initially in the trial court. We remanded to allow Secaucus to amend its complaint and directed that it join the other Hudson County municipalities in the litigation. The partial adjustment in the present judgment for the

period from 1986 to May 27, 1988, simply preserves the relief for that period given the non-Bayonne municipalities in the first judgment. That relief is not retroactive to the complaint.

Affirmed.

APPENDIX E — ORDER OF THE SUPREME COURT OF NEW JERSEY FILED AUGUST 31, 1990

SUPREME COURT OF NEW JERSEY
M-1616 September Term 1989

TOWN OF SECAUCUS,

Plaintiff-Movant,

vs.

HUDSON COUNTY BOARD OF TAXATION, COUNTY OF HUDSON, CITY OF BAYONNE, BOROUGH OF EAST NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWNSHIP OF NORTH BERGEN, CITY OF UNION CITY, TOWNSHIP OF WEEHAWKEN, and TOWN OF WEST NEW YORK,

Defendants-Respondents.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the Appellate Division order of August 21, 1990 is partially vacated; the request for relief in the form of credits and debits for prior years' payments under the two-tier tax is denied; however, for tax year 1990 and for the 1990 Abstract of Ratables, the Hudson County Board of Taxation is directed to apportion county taxes among the twelve municipalities according to a single county rate.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 30th day of August, 1990.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX F — EMERGENT ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED AUGUST 20, 1990

EMERGENT ORDER

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DKT. NO.
MOTION NO.
BEFORE PART: S
JUDGES: MUIR, JR. AND BROCHIN

TOWN OF SECAUCUS,

Plaintiff,

vs.

HUDSON COUNTY BOARD OF TAXATION, COUNTY OF HUDSON, CITY OF BAYONNE, BOROUGH OF EAST NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWNSHIP OF NORTH BERGEN, CITY OF UNION CITY, TOWNSHIP OF WEEHAWKEN, and TOWN OF WEST NEW YORK,

Defendants.

EMERGENT APPLICATION
FILED:
8/14/90 BY: *F. Gerald Fitzpatrick, Esq. (City of Bayonne)*
ANSWERS FILED:
8/17/90 BY: *Frances C. Holland, Esq. (Town of Secaucus)*
8/15/90 *Margaret A. Holland, DAG (Hudson County Board of Taxation)*

Appendix F

8/15/90	*Elizabeth T. McNamara, Asst. County Counsel (County of Hudson)*
8/17/90	*Richard P. Venino, Esq. (Township of Weehawken)*
8/16/90	*Eugene P. O'Connell, Director of Law (City of Hoboken)*
8/17/90	*Norman A. Doyle, Jr., Esq. (Town of Kearny)*
8/16/90	*Herbert Klitzner, Township Attorney (Twp. of North Bergen)*
8/17/90	*Joseph S. Sherman, Esq. (City of Union City)*
8/17/90	*Barry P. Sarkisian, Town Attorney (Town of West New York)*

APPEARANCES ONLY: *Richard A. Bowe, Esq. (Town of Guttenberg*
Mary Ann Murphy, Esq. (City of Jersey City)

DATE ARGUED: *8/17 via telephone conference (see attached list for names of counsel participating in argument).*

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 20TH DAY OF AUGUST, 1990, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR STAY OF JUDGMENT PURSUANT TO R:2:9-8.	GRANTED xx

SUPPLEMENTAL: The stay is granted. The Clerk of the Appellate Division is directed to place this case on an accelerated briefing schedule.

Appendix F

FOR THE COURT:
s/ Robert Muir, Jr.
ROBERT MUIR, JR. J.A.D.

APPENDIX G — ORDER GRANTING SUMMARY JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY FILED JULY 27, 1990

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

Docket No. L-094204-86 PW

CIVIL ACTION

ORDER GRANTING SUMMARY JUDGMENT

TOWN OF SECAUCUS,

Plaintiff,

- vs -

HUDSON COUNTY BOARD OF TAXATION, COUNTY OF HUDSON, CITY OF BAYONNE, BOROUGH OF EAST NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY,

Appendix G

TOWN OF KEARNY, TOWN OF NORTH BERGEN, CITY OF UNION CITY, TOWN OF WEEHAWKEN, and TOWN OF WEST NEW YORK,

Defendants.

THIS MATTER having been presented to the Court by Holland & Holland, P.C., (Frances C. Holland, Esq. appearing) and Ravin, Sarasohn, Cook, Baumgarten, Fisch & Baime, (Bernard Schenkler, Esq. appearing), co-counsel to Plaintiff, Town of Secaucus, in the presence of Robert Del Tufo, Attorney General (Harry Haushalter, Deputy Attorney General appearing); Kathleen M. Grant, Esq., Assistant Hudson County Counsel; Robert F. Sloan, Esq., attorney for defendant Bayonne; Libero D. Marotta, Esq. attorney for defendant East Newark; Richard A. Bowe, Esq., attorney for defendant Guttenbert; Eugene O'Connell, Esq., attorney for defendant Hoboken; Mary Ann Murphy, Esq., attorney for defendant Jersey City; Norman A. Doyle, Esq., attorney for defendant Kearny; Herbert Klitzner, Esq., attorney for defendant North Bergen; Joseph S. Sherman, Esq., attorney for defendant Union City; Le Roy D. Safro, Esq., attorney for defendant Weehawken; and Joseph A. Apicella, Esq., attorney for defendant West New York; on a motion for summary judgment, and the Court having considered the moving and opposing papers and argument of counsel and for the reasons set forth in a written opinion dated June 29, 1990, and good cause being shown;

IT IS on this 9th day of August 1990;

ORDERED, that summary judgment be and hereby is granted in favor of Plaintiff as follows:

1. *N.J.S.A.* 18A:54-37 be and hereby is declared unconstitutional and invalid under the uniformity clause of the

Constitutional, Art. VIII Sec. 1 and under the constitutional proscription against special legislation, Art. IV., Sec. 7, Par. 9(6).

2. The methodology utilized by the defendant Hudson County Board of Taxation pursuant to *N.J.S.A.* 18:54-37 to collect the second-tier county tax from the non-Bayonne municipalities for added and omitted assessments and to retain and use the additional funds for general county purposes be and hereby is invalidated as discriminatory in favor of defendant Bayonne and said invalidation applies to applications of excess two-tiered payment to the general county budget commencing with the tax year 1986; and

3. The Hudson County Board of Taxation shall calculate the amount collected from the eleven Hudson County municipalities other than Bayonne on account of added and omitted assessments between 1986 and May 27, 1988, and calculate the reduced amount which should have been due and payable from the eleven Hudson County municipalities, other than Bayonne, had the added and omitted assessment tax proceeds been segregated and applied to reduction of the subsequent tax year's County Vocational School Budget. The Hudson County Board of Taxation shall further calculate any reallocation of the apportionment of the Hudson County Budget among all twelve municipalities including Bayonne. Any debits and credits shall be set forth in the 1990 Hudson County Abstract of Ratables to be adopted by the Hudson County Board of Taxation; and

4. The Hudson County Board of Taxation shall calculate as a debit of Bayonne its proportionate share of the cost of the budget of the Hudson County Vocational School from and after May 27, 1988 and the resultant credits to the remaining eleven Hudson County municipalities for over-payments on for the budget of the

Hudson County Vocational School from or after May 27, 1988. Any such debits and credits shall be set forth in the 1990 Hudson County Abstract of Ratables to be adopted by the Hudson County Board of Taxation; and

5. For the tax year 1990 and thereafter, the two-tiered system implemented by the Hudson County Board of Taxation under *N.J.S.A.* 18:54-37 is abolished and the cost of funding the Hudson County Vocational School shall be included in the general county budget. Hudson County taxes shall be apportioned among the twelve municipalities in the 1990 Hudson County Abstract of Ratables by the Hudson County Board of Taxation according to a single county rate and in every tax year thereafter is to be so apportioned in the Hudson County Abstract of Ratables.

s/ John J. Hopkins
Hon. John J. Hopkins, J.T.C. t/a

(2)

No. 93-693

Supreme Court, U.S.
FILED
JAN 28 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

CITY OF BAYONNE,

Petitioner,

vs.

TOWN OF SECAUCUS, HUDSON COUNTY BOARD OF TAXATION, COUNTY OF HUDSON, BOROUGH OF EAST NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWNSHIP OF NORTH BERGEN, CITY OF UNION CITY, TOWNSHIP OF WEEHAWKEN and TOWN OF WEST NEW YORK,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT TOWN OF SECAUCUS

FRANCES C. HOLLAND
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On the Brief
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78 pp

QUESTIONS PRESENTED

1. Under settled law, may a municipality rely upon the Fourteenth Amendment to the United States Constitution in an action against the State that created it?

2. Has the Petitioner demonstrated legally sufficient Supreme Court review jurisdiction or has it improperly attempted to "supplement" the record below so as to artificially create and concoct the appearance of federal jurisdiction?

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Appendix C — Opinion — *Town of Secaucus v. Hudson County Board of Taxation and County of Hudson*, Docket No. A-4854-86T8 (N.J. Super. Ct., App. Div., May 18, 1988) 39a

STATEMENT OF THE CASE

The petition for writ of certiorari filed by the City of Bayonne with the United States Supreme Court seeks this Court's exercise of review jurisdiction and seeks to invoke the protection to the City of Bayonne of the Fourteenth Amendment to the Constitution of the United States by alleging purported denials to the municipality of due process and equal protection rights resulting from the August 4, 1993 New Jersey Supreme Court judgment in a state case. Settled principles of law establish that a municipality cannot invoke Fourteenth Amendment protection in an action against the State that is its creator. *Williams v. Mayor of Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933). The New Jersey Supreme Court is the highest court of the judicial branch of the State government. The City of Bayonne is a political subdivision of the State of New Jersey located in the County of Hudson. Respondent, Town of Secaucus, and the Petitioner, City of Bayonne, are two of the twelve constituent municipalities of Hudson County. Ten of the other respondents are Hudson County municipalities which are to be financially recompensed for their past county tax overpayments, as is Secaucus, under the terms of the recent New Jersey Supreme Court judgment; Bayonne is required to satisfy its prior underpayments of past years' county taxes.

The petitioner, Bayonne's "Statement of Jurisdiction" states inaccurately that this Court has jurisdiction, pursuant to 28 U.S.C. § 1257(a), to review these exclusively state issues of this case within the judgment of the Supreme Court of New Jersey. Further, the petitioner's "Statement of the Case" and "Questions Presented" misstate relevant facts, expanding and inaccurately shading the facts of the state court record in an unsuccessful attempt to generate a colorable "factual" predicate for federal jurisdiction and grant of certiorari for review of the state court judgment. Petitioner's ostensible history dealing with "reliance" by Bayonne was also not part of the state court record.

The New Jersey Supreme Court affirmed both the judgment of the Appellate Division of the Superior Court of New Jersey and the trial court judgment of the Superior Court, Law Division, finding N.J. Stat. Ann. ("N.J.S.A.") 18A:54-37 to be constitutionally invalid under the New Jersey Constitution (1947) and finding implementation by the Hudson County Board of Taxation ("HCBT") to be unauthorized by the state statute and discriminatory to the "non-Bayonne" Hudson County municipalities. The subject state statute codified as N.J.S.A. 18A:54-37 and now stricken by the New Jersey Supreme Court had been enacted by the New Jersey State Legislature in 1973 to provide the City of Bayonne with an exemption from county taxes that fund the costs of the Hudson County Vocational School. Two different county tax rates were created by HCBT in order to implement the exemption, the lower rate for Bayonne exempting it from the HCVS portion of county taxes and the higher rate for the "non-Bayonne" municipalities including the HCVS portion of the county budget. But, HCBT had also applied the higher tier county tax rate created to implement county taxes including costs of HCVS to the added and omitted assessment property rolls of the "non-Bayonne" municipalities each year long after the HCVS had been funded, producing the "non-Bayonne" municipalities' excess tax payments from the higher rate and causing their deposit into the county surplus for use in the following year in application to general county costs other than of HCVS. This HCBT methodology thereby improperly exempted Bayonne from payment of county taxes for other portions of the next year's general county budget, affording Bayonne an additional exemption from county taxes not authorized by the state statute or by other state law.

The only questions in the state proceedings were issues of New Jersey state law involving challenges under the New Jersey Constitution as special tax legislation and as violation of the tax uniformity clause by the subject state statute, which exclusively

exempted the petitioner-municipality from a part of county taxation funding the HCVS portion of the general county budget, and a related challenge also under State law to the improper administrative calculation and implementation of county tax apportionment by the HCBT, improperly exempting the petitioner-municipality from payment of county taxes for aspects of the county budget other than for HCVS, in a manner not authorized by the subject statute.

No federal questions were pressed, passed upon or in any way involved in this state case. The New Jersey Supreme Court decision in this case is based purely upon state grounds: (i) that the challenged exemption statute was unconstitutional special legislation pertaining to taxation, or exemption, barred by the prohibition on special tax legislation found at article IV, § 7, ¶ 9 of the 1947 New Jersey Constitution; and (ii) that the HCBT's implementation of the stricken statute to county tax allocation was discriminatory in its application to all the "non-Bayonne" municipalities of Hudson County. The thirty-four page trial court decision (Ra1) and the Appellate Division opinion, reported as *Secaucus v. Hudson County*, 255 N.J. Super. 665, 605 A.2d 1151 (N.J. Super. Ct. App. Div. 1992), also rest purely upon questions of state law. No issues of federal law were pressed or proffered by the City of Bayonne, or by any other party, either explicitly or "implicitly" at any stage of the state proceedings.

A. N.J.S.A. 18A:54-11, The State Statute.

Since the 1930's Bayonne maintained a vocational education program, initially in a separate vocational high school, but by the 1960's fully integrated within Bayonne's comprehensive high school. There was no "vocational education" student per se. Students in Bayonne's vocational program fully participated in high school activities with other students, and attended many classes with other non-vocational education students.

The subject state statute originally introduced in the New Jersey State Senate by Senator Dugan in the 1972 Legislative Session, as Senate Bill No. 74, when subsequently enacted, provided as follows:

> 1. Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey Statutes *in any county of the first class having a population of not more than 700,000* according to the 1970 Federal Census, each municipality included within a school district [maintaining a system of] *which has maintained for a minimum of 20 years* a vocational education *program* approved for the purposes of Federal and State allotment of vocational funds by the Commissioner of Education under the regulation of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.

1973 N.J. Laws, c. 305, §1.

From the time of this statute's enactment of all the State's municipalities *only* Bayonne qualified for exemption. The New Jersey Supreme Court found that the original proposed legislation before amendment in the Senate Education Committee ". . . would have exempted virtually every municipality with a vocational education program from contributing to the support of its county vocational school." *Town of Secaucus v. Hudson County Board of Taxation,* 133 N.J. 482, at 487, 614 A.2d 616 (N.J. 1992) (Pa3).

The committee amendment narrowed the terms of the original Bill from *all municipalities* with a "system of vocational

education" limiting its application *to only* those municipalities in a county of the first class having a population of under 700,000, and maintaining a program for a minimum of 20 years. The Senate Education Committee Statement to the Bill left no doubt as to the legislative intent:

> This bill, as amended, would exempt the city of Bayonne from any assessment of taxes due to the cost of supporting the county vocational school in Hudson County.

The legislative history of the subject statute shows that as originally proposed, the exemption would have applied to any municipality within a school district maintaining a system of vocational education approved for federal or state funding. Thus the original general object was to provide relief for any (and all) of those New Jersey municipalities operating their own vocational education systems or programs, or included within districts approved for aid purposes, from the hardship of simultaneous support of a county vocational school. The trial court found that virtually every municipality in the state receives some federal funds from vocational education. (Ra13). The New Jersey Supreme Court Opinion found that "[a]t least twenty municipalities within the state maintained their own vocational-education program . . .," *Id.* 133 N.J. 482, at 495 (Pa13). Upon committee amendment substantially restricting its scope by aggregate, multiple limitations, and subsequent enactment of the special state statute, however, only Bayonne became exempt, because of all the state's municipalities, only Bayonne was located in a county of the first class having a population less than 700,000 (Hudson County) *and* had maintained a vocational educational program approved for aid for the requisite 20 years. The restricted state statute as thus enacted provided by its aggregate, multiple limiting classifications that there be no apportionment of county tax to Bayonne for amounts in the general county budget for the use of the county vocational school district.

The New Jersey Supreme Court Opinion, after engaging in a well-reasoned and detailed special legislation constitutional analysis of the statute's purpose and application of that purpose to the specific facts of the case, concluded that the statute as it actually operates does not represent a reasonable legislative classification and, therefore, violates the prohibition on special legislation of art. IV, § 7, ¶ 9, of the New Jersey Constitution. *Id.* 133 N.J. 482, at 501 (Pa20).

B. The State Proceedings.

On October 17, 1986 Secaucus, a Hudson County municipality, instituted an action in lieu of prerogative writs in the Superior Court of New Jersey, Law Division: (i) against the defendants, Hudson County Board of Taxation ("HCBT") and Hudson County, alleging overpayments of county taxes in past years, seeking declaratory and prerogative writ relief requiring exclusion of the higher two-tiered county tax rate apportioning vocational school costs from the Secaucus rate of tax payment to the county on account of added and omitted assessment property lists after full funding each year for the County Vocational school and (ii) against Hudson County for damages to the extent of plaintiff's past overpayments of county taxes, for the years 1981 through 1986, resulting from HCBT's erroneous use of the two-tiered rate applicable to the funding of the vocational school for HCBT's calculations of Secaucus' county tax payments on account of added and omitted assessments. Plaintiff sought summary disposition in respect to the declaratory and prerogative writ relief. Secaucus served notice upon Bayonne and all the other Hudson County municipalities with copies of the Complaint, upon filing with the Superior Court, Law Division. *None* of the Hudson County municipalities intervened in the action, despite the notice provided by Secaucus.

On March 5, 1987, the trial court determined that the

combined two tier rate created by HCBT for the "non-Bayonne" municipalities, in order to exempt Bayonne from apportionment of county taxes appropriated for the Hudson County Vocational School ("HCVS"), when applied by the HCBT to added and omitted assessment property rolls of the "non-Bayonne" municipalities after funding had been raised for the county vocational school resulted in undue discrimination to all Hudson County municipalities other than Bayonne due to the methodology whereby the funds were received by the County into surplus for general county purposes. The remedy for this discrimination adopted in 1987 by the trial court was the segregation by the County in escrow of the "non-Bayonne" municipalities' vocational school higher tier county tax rate component from added and omitted taxes to be used for county vocational school costs in the ensuing year. Secaucus' claim against the County for past damages was withdrawn and dismissed by the trial court without prejudice; judgment was entered on April 16, 1987, but stayed pending appeal. Cross-appeals on the issue of remedy were then filed (Docket No. A-4854-86T8). During the appeal, it became apparent to Secaucus that the subject state statute did not pass muster under the New Jersey Constitution. The Appellate Division, in an unpublished Opinion dated May 16, 1988, reversed on the issue of remedy, and remanded the matter to the Law Division for further proceedings on the remedy on the grounds that all of the other Hudson County municipalities, although given notice of the action and served by Secaucus with the October 16, 1986 Complaint, were not joined as parties, and because Secaucus had raised substantial constitutional questions arising under the New Jersey Constitution on appeal requiring the trial court's initial determination. *See* 1988 Appellate Division Slip Op. (Ra9).

Pursuant to the Appellate Division's 1988 remand and the leave granted to Secaucus by the trial court to amend its Complaint, Secaucus filed its Second Amended Complaint in Lieu of Prerogative Writs contending the constitutional invalidity of

N.J.S.A. 18A:54-37, both by violation of the special tax legislation prohibition of art. IV, § 7, ¶ 9 and of the tax uniformity requirement of art. VIII, § 1, ¶ 1 of the New Jersey Constitution (1947), in addition to the matters set forth in the earlier Complaint. The Second Amended Complaint named Bayonne and all of the other "non-Bayonne" Hudson County municipalities as parties defendant.

On June 29, 1990, the trial court issued a 34-page written opinion finding that N.J.S.A. 18A:54-37 violated both the special legislation prohibition and the uniformity requirement of the New Jersey Constitution (1947), and finding the higher tier tax rate as applied by HCBT to the added and omitted tax rolls of the "non-Bayonne" municipalities to be improper and discriminatory and beyond the scope of the statute. (Ra1-34). The August 9, 1990 trial court judgment granted *partial relief only for the period from 1986 to May 1988* from HCBT's improper implementation of the statute which resulted in overpayments of county taxes by the "non-Bayonne" municipalities on their added and omitted assessments, mandating credits on subsequent county taxes to be provided to the "non-Bayonne" municipalities in compensation for prior overpayments of county taxes and debits to Bayonne in restitution for prior underpayments of county taxes resulting from the implementation by HCBT.

Full relief from the application of the unconstitutional statute was granted by the 1990 trial court judgment: (i) by full elimination of the two-tiered county tax rates commencing with those 1988 and 1989 county tax rates determined subsequent to the May 27, 1988 filing of Secaucus' motion to amend the Complaint alleging unconstitutionality, with adjustments of past overpayments of county taxes by credits to the non-exempted, "non-Bayonne" municipalities on subsequent county taxes and of past underpayments by debits to Bayonne on subsequent county taxes and also (ii) by HCBT's required implementation in the 1990

Abstract of Ratables of a single county tax rate and thereafter (for the subsequent general county budget cost apportionment) among all Hudson County municipalities. Finally, the trial court required all credits to the "non-Bayonne" municipalities and debits to Bayonne on subsequent county taxes resulting from all aspects of remedies granted by the trial court to be implemented by HCBT in the 1990 Hudson County Abstract of Ratables. At the conclusion of a full hearing on settlement of the order on August 9, 1990, the trial court entered the Order implementing its Opinion granting summary judgment.

Bayonne filed a Notice of Appeal and moved for emergent stay pending appeal, granted by the Appellate Division on August 20, 1990. Secaucus moved before the New Jersey Supreme Court for dissolution, or partial dissolution of stay. On August 31, 1990, the New Jersey Supreme Court vacated the stay for the part of the judgment requiring HCBT in the 1990 County Tax Abstract to apportion subsequent county taxes according to a single county rate among all municipalities, but *pending appeal only* continued stay of HCBT's implementation of credits and debits on county taxes to the municipalities: (i) for prior years' payment under the two county rates pursuant to the stricken exemption statute from May 27, 1988 through the 1989 tax year; and (2) for HCBT's improper and discriminatory application of the higher county tax rate to the added and omitted assessments of the "non-Bayonne" municipalities from 1986 to May 27, 1988 beyond the scope of the statute. HCBT filed a notice of appeal and Hudson County filed a cross- appeal, but on January 17, 1991, the Appellate Division entered an Order withdrawing the County's cross-appeal with prejudice.

On April 21, 1992, the Appellate Division filed its Opinion affirming the trial court. *Town of Secaucus v. Hudson County Board of Taxation*, 255 N.J. Super. 665, 605 A.2d 1151 (N.J. Super. Ct. App. Div. 1992) (Pa43). The Appellate Division's final

judgment held that the stricken statute violated the tax uniformity clause of the 1947 New Jersey Constitution and that the violation arose from the absence of uniformity in the distribution of the county tax burden due to the application of two county tax rates.

The Appellate Division Opinion reasoned that:

> [t]he overriding consideration in this appeal is that because of the constitutional mandate that there be a uniform county tax rate the Legislature may not excuse a municipality from paying county taxes that fund a county facility even though the facility is not used by its citizens - just as the legislature may not excuse an individual taxpayer from paying local taxes to fund a public school district even though the public school is not used by the taxpayer's children.

(Pa48).

The Appellate Division did not reach the question of the Law Division's ruling that the statute constituted special legislation. In May 1992, HCBT and Bayonne filed petitions for certification and notices of appeal as of right with the New Jersey Supreme Court. The Supreme Court of New Jersey granted certification, 130 N.J. 393, 396, 614 A.2d 616 (N.J. 1992) (Pa40). On August 4, 1993, the Supreme Court of New Jersey found the subject statute to be unconstitutional as special legislation prohibited by art. IV, § 7, ¶ 9 of the New Jersey Constitution (1947). Having found the statute to be unconstitutional as special tax legislation, the Supreme Court of New Jersey found it unnecessary to reach the issue of whether the statute also violated the tax uniformity clause of art. VIII, § 1, ¶ 1(a). The Supreme Court of New Jersey also affirmed the Appellate Division judgment and 1990 Law Division judgment as follows:

> Accordingly, we affirm the judgment of the Appellate Division that HCBT should debit Bayonne and credit the remaining Hudson County municipalities the appropriate added and omitted assessments for the period from 1986 to May 27, 1988, and for the 1989 tax year. To ease the burden on Bayonne, we modify the Appellate Division decision to direct HCBT to calculate the appropriate debits and credits and implement them on a pro-rated basis over a reasonable period of time. We further affirm the elimination of the two-tiered Hudson County tax rate that was ordered in 1990.

(Pa29).

Subsequently, on August 13, 1993, HCBT took official action establishing a four-year period commencing in 1993 for implementation of the credit and debit remedies within subsequent county tax apportionments required pursuant to the New Jersey Supreme Court Opinion. On September 22, 1993, the New Jersey Supreme Court denied Bayonne's application for stay pending the filing of Bayonne's petition to the United States Supreme Court for writ of certiorari. On October 7, 1993, the Honorable David H. Souter, Associate Justice of the United States Supreme Court, denied Bayonne's petition for stay.

As to the aspect of remedy imposed as a result of the Constitutional invalidity of the statute, even upon completion of HCBT remedial implementation four years after 1993, of the New Jersey Supreme Court's judgment, including the satisfaction of remedial "single rate" county tax repayments from Bayonne (for underpayments in the period from May 1988) by debits, Bayonne will still retain the financial benefit from all past HCVS

exemptions from county taxes under the stricken state statute for the period from enactment in 1973 to 1988, a 15-year period, under the terms of the now-stricken exemption statute. Bayonne had also gained a delay of two years by state court stays pending appeal before making any of the county tax repayments initially ordered by the Court in 1990, plus a four-year pro-rated period of debit apportionment of the county tax repayments recently granted by HCBT, pursuant to the New Jersey Supreme Court judgment.

REASONS FOR DENYING THE WRIT

In urging the Court to grant certiorari, the petitioner municipality asserts privileges and immunities under the Fourteenth Amendment to the United States Constitution against the highest court of the judiciary branch of the State that created it, despite the complete absence of any legal authority in support of this position. Indeed, to the contrary result, it is accepted under settled principles of law, that a municipality cannot invoke the protection of the Fourteenth Amendment to the United States Constitution in an action against the State that is its creator. *Williams v. Mayor of Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015, (1933), *Paramus v. Bergen County*, 2 N.J. Tax 515 (N.J. Tax Ct. 1981). Counties are similarly barred from invoking the protection of the federal Constitution or the state Constitution against the State, *Clark v. Degnan*, 83 N.J. 393, 416 A.2d 816 (N.J. 1980); *Camden v. Byrne*, 82 N.J. 133, 157, 411 A.2d 462 (N.J. 1980), *Bergen Cty. Sewer Auth. v. Little Ferry*, 7 N.J. Super. 213, 222-223, 72 A.2d 886 (N.J. Super. Ct. App. Div. 1950).

The courts have also consistently found on a related issue that both municipalities and counties having been created by the State are subject to its control. *Williams v. Mayor and Council of Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933); *Trenton v. New Jersey*, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923); *Mobile County v. Kimball*, 102 U.S. 691, 26 L. Ed. 238 (1881); *McKenney v. Byrne*, 82 N.J. 304 (N.J. 1980).

Municipalities do possess the right to attack a statute as being in violation of the New Jersey Constitution, the theory being that an unconstitutional enactment is invalid and also that as to statutes requiring public fund expenditure, the municipality is a fiduciary and trustee of the public interest in expenditure of public funds. *Kenney v. East Brunswick Tp.*, 172 N.J. Super. 45, 49-50 (N.J. Super. Ct. App. Div. 1980). This was the basis of Secaucus' claims in the State case as presented in its Amended Complaint. It is absolutely clear, however, that municipalities do *not* possess Fourteenth Amendment rights arising under the federal Constitution.

Neither can the municipality assert the federal constitutional rights of its taxpayers and citizens, where none have intervened in the state case. Nor could the municipality have maintained such an action under the New Jersey Constitution. As the court held in *Glassboro v. Byrne*, 141 N.J. Super. 19, 23, 357 A.2d. 65 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 71 N.J. 518, 366 A.2d 674 (N.J. 1976), equal protection considerations are not available or pertinent to municipal corporations.

The petitioner's jurisdictional statement inaccurately contends, without providing any specificity in support of its statement, that jurisdiction of this Court to review the state court judgment lies in 28 U.S.C. §1257. This contention is not supported either in the petition, or in the record of the state court action, which devolved entirely upon issues of state law. No federal questions were presented below by any party, nor did any federal questions pertain to the case. Attempting to buttress its ill-founded contentions, petitioner inaccurately claims (at Pb 8) that in defending the state case it argued "*implicitly*, that if the Act was stricken, the rights safeguarded to the residents of Bayonne. . . would be impermissibly infringed . . . ." (emphasis added).

The gravamen of Bayonne's Petition is that its very active

participation in five years of New Jersey state court proceedings, commencing in 1988 in the trial court and concluding in 1993 with the New Jersey Supreme Court Judgment, allowed it insufficient process — notice and opportunity to be heard — to provide an adequate basis upon which the New Jersey courts could in fairness premise a determination that due to HCBT's improper administration (and also due to the unconstitutional exemption statute) Bayonne had improperly underpaid past county taxes, resulting in county tax overpayments by the other municipalities of the County. In an argument never raised in the state court action in the petition, Bayonne now also urges belatedly to this Court that the municipality possessed a "reliance" interest in the stricken county tax exemption granted by the state statute, somehow worthy of federal constitutional protection under the Fourteenth Amendment, or analogous to a "vested right", but unrecognized or unprotected by the New Jersey Supreme Court. Bayonne also alleges incorrectly that the well-reasoned analysis and fully supported determinations of state law affirmed within the New Jersey Supreme Court Judgment were arbitrary in their application to the municipality.

The existence of a federal question is an absolute requirement for United States Supreme Court exercise of appellate jurisdiction reviewing the decision of a state court. 28 U.S.C.A. § 1257. *Pelliconi v. Schuyler Packing Co.*, 140 N.J. Super. 190, 356 A.2d 4 (N.J. Super. Ct. App. Div. 1976). *See, e.g., Henry v. Mississippi,* 379 U.S. 443, 85 S. Ct.564, 13 L. Ed. 2d 408 (1965); *Martin v. Hunter's Lesee;* 1 Wheat. 304, 4 L. Ed. 97 (U.S. 1816); 28 U.S.C.A. § 1257; Hart & Wechsler, *The Federal Courts and the Federal System* (2d ed. 1973) at 470-526. Thus, under our federal governmental system, the federal courts have no jurisdiction to review a state court judgment except when a federal question has been presented. Only in such a case presenting a federal question may the final decree or judgment of the highest state court in which a ruling might be had may there be review on certiorari in the

Supreme Court of the United States. *Reich v. City of Freeport*, 388 F. Supp. 953, (D.C. Ill. 1974), *aff'd*, 527 F.2d 666 (7th Cir. 1975). The Supreme Court of the United States possesses no inherent corrective power of review over state courts as it holds to supervise and review proceedings in federal courts. *Hoag v. State of N.J.*, 356 U.S. 464, 78 S. Ct. 829, 2 L. Ed. 913, *rehearing denied*, 357 U.S. 933, 78 S. Ct. 1366, 2 L. Ed. 2d 1375.

Even in those cases where there are errors in federal law application in state court judgments, the United States Supreme Court will not review if the state court judgment rests on independent and adequate state grounds. 28 U.S.C.A. § 1257(a). *Super Tire Engineering Co. v. McCorkle*, 550 F.2d, 903, (3rd Cir. 1977), *cert. denied*, 98 S. Ct. 16, 434 U.S. 827, 54 L. Ed. 2d 86, *rehearing denied*, 98 S. Ct. 753, 434 U.S. 1025, 54 L. Ed. 2d 773.

There are clearly no questions of federal law in this case. In the state court action, Bayonne did not assert any argument arising from the United States Constitution. The state court action was determined exclusively by state law. [Yet, Bayonne, a New Jersey municipality, has now filed a petition for writ of certiorari which claims that the New Jersey Supreme Court has denied Bayonne's alleged rights of equal protection and of substantive due process pursuant to the Fourteenth Amendment of the United States Constitution.]

In the petitioners' question 1 of "Questions Presented" in its Jurisdictional Statement, the petitioner juxtaposes various factual inaccuracies to convince this Court by these inaccuracies that HCBT and Hudson County were "sham defendants" (Pb12), that it had been treated unfairly and had been denied proper legal process by the New Jersey Supreme Court. Petitioner inaccurately claims that the plaintiffs' Prerogative Writ procedure seeking mandamus against HCBT and Hudson County was a "sham" designed to maximize Bayonne's potential liability. The procedural history and facts of the state case reveal that this is absolutely untrue.

Further, the only basis upon which Bayonne was found financially responsible in 1990 by the trial court was because it had previously, significantly underpaid its proper proportionate share of county taxes and these repayments of county tax by Bayonne are the basis of the trial court judgment providing restitutionary credits to Secaucus and the other "non-Bayonne" Hudson County municipalities for their resultant past overpayments of proportionate shares of county taxes. Thus, pursuant to N.J.S.A. 54:4-49 providing for obligatorreadjustment by debits and credits for underpayment or overpayment of tax, Bayonne was obliged by the Courts to satisfy its prior underpayments of county tax. As found by the New Jersey Courts in *Roseland v. Essex County Board of Taxation*, 18 N.J. Misc. 613, 15 A.2d 765 (St. Bd. Tax App. 1940), this statutory provision, N.J.S.A. 54:4-49, does not impose any limitations period for the correction of apportionments of county and state taxes to the municipalities.

Bayonne's first faulty contention is that the New Jersey Supreme Court denied the City's alleged substantive (and procedural) due process rights. Ignoring the clear mandate of N.J.S.A. 54:4-49, Bayonne also inaccurately claims that the State Court judgment requiring the municipality to make restitutionary payments of county taxes to satisfy its prior county tax underpayments arising from the improper county tax benefit it gained through HCBT's improper methodology of apportioning added and omitted assessment county taxes and also its county tax underpayments from the post-1988 exemption statute applications, to provide recompense to the "non-Bayonne" Hudson municipalities for their resulting overpayments of county taxes, imposes improper "retroactive" "damages". Bayonne also claims without basis that through its reliance on the statutory exemption and upon HCBT's improper administrative method granting Bayonne the extra exemption on county tax outside the statutory scope, the municipality has purportedly acquired some further unspecified (property) rights permitting it to retain the

improper benefits from prior underpayments of county taxes and entitling it to continue ongoing to receive county tax exemption relief from the HCVS portion of county taxes pursuant to the terms of the now-invalidated exemption statute.

When the 1988 Appellate Division Opinion reversed and remanded for further proceedings by the trial court, and upon remand Bayonne was a party defendant. *Thus Bayonne participated fully in all state court proceedings in which its interests were determined by the state courts.*

In New Jersey, orders to accomplish proper apportionment and equality of taxation between constituent municipalities of the same county are enforceable by *mandamus. Middlesex County Bd. of Taxation v. Borough of Sayreville,* 133 N.J. Super. 41, 335 A.2d 73 (N.J. Super. Ct. App. Div. 1975). This is true when the order is directed to the county board of taxation, upon whom the primary duty for securing a fair allocation among the constituent municipalities of the common county tax burden under the state's statutory scheme for local taxation of real property. *Borough of Sayreville v. Middlesex County Bd. of Taxation,* 133 N.J. Super. 46, 335 A.2d 75 (N.J. Super. Ct. App. Div. 1975). State law requires that "the fiscal burden of county government shall be apportioned equally and impartially among the several municipalities." *Clifton v. Passaic County Bd. of Taxation,* 28 N.J. 411, 418 A.2d 1 (N.J. 1958).

The mandamus remedy was sought by Secaucus in the original state case, in conjunction with a judgment on certiorari to review and invalidate improper governmental acts, in order to compel the public officials of the county tax board and the county to properly apportion, collect and apply county taxes in conformity with the law. The focus of the initial action in lieu of prerogative writs by Secaucus was to rectify and correct improper imposition, calculation and collection of county taxes by HCBT on added and

omitted assessments and improper applications by the County of the excess public funds resulting in Secaucus' overpayments of county tax. Subsequent to the 1988 remand by the Appellate Division, Bayonne participated in all court proceedings as a defendant in the case before any of the issues of remedy in the case were determined by the trial court and thereafter Bayonne participated as an appellant through two levels of state appellate review including in the state's highest court.

Despite the fact that this state case presents no statute of limitations defense or question applicable, Petitioner's Brief nonetheless argues that the "relation back" concept, limiting amendment of pleadings in a statutorily time-barred action, should be applied by this Court to a state certiorari and mandamus action reviewing validity of governmental acts and compelling compliance of public officers of state entities with statutory obligations barring unfair allocation of county taxes and improper application of public funds. Invalid governmental acts beyond the scope of legal authority do not become validated merely by the passage of time. As stated *infra*, in New Jersey when apportionment of county and state taxes has been incorrectly accomplished, N.J.S.A. 54:4-49 requires the corrective reallocation of county and state taxes to the municipalities.

"Relation back" and similar limitation of action defenses and concepts cited by petitioner can only arise in cases from express legislative intent inherent to public purpose in enactment of applicable statutes of limitation. A statute of limitation is a legislative mandate by statute effectively limiting both the jurisdiction of the court to adjudicate certain claims or causes of action and also thereby limiting the rights of litigants to maintain litigation of particular causes of action in support of these claims. In the case of *Fischer v. Twp. of Bedminster*, 5 N.J. 534, 76 A.2d 673 (N.J. 1950), the New Jersey Supreme Court held that a legislative statute of limitations attempting to limit jurisdiction of

the New Jersey Court in actions in lieu of prerogative writs was unconstitutional and expressly barred by art. VI, § 5, ¶ 4, of the New Jersey Constitution (1947), which provides as follows:

> Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, *on terms and in the manner provided by rules of the Supreme Court*, as of right, except in criminal causes where such review shall be discretionary.

(Emphasis added).

The court in *Fischer* found that this New Jersey constitutional provision intended that actions in lieu of prerogative writs in the State be regulated solely by New Jersey Supreme Court rule without any legislative interference. *Fischer, Id.* 5 N.J. at 539. Petitioner freely admits in its petition at (Pb13) that there is no statute of limitations question in this case, but, nonetheless, argues irrelevantly that limitation of action principles unrelated to prerogative writ relief and without any existing state limitations statute nonetheless should have been applied by the State court and now should be applied by this Court.

Petitioner in its second "Question Presented", in support of its jurisdictional statement, attempts to create a purported issue from other New Jersey statutes permitting optional county service programs, such as county library services or county health services, where municipalities may choose as an alternative to provide their own local services. In the state court action, Bayonne claimed those other optional statutory programs demonstrated the generality of N.J.S.A. 18A:54-37.

The New Jersey Supreme Court in finding the statute N.J.S.A. 18A:54-37 unconstitutional special legislation, because it

unreasonably limited the scope of application to municipalities operating local vocational programs by the aggregate limiting classifications of longevity of local program, total county population and county population density, noted that this statute was readily distinguishable from statutes (of general application) permitting optional county services programs, as an alternative to local provision of service. The Court citing in support of its decision in *Vreeland v. Byrne*, 72 N.J. 292 at 301, 370 A.2d 825 (N.J. 1977), concluded on this point by emphasizing that in each case the test of generality is whether the statute "rests upon a reasonable or rational basis relevant to the purpose and object" of the enactment. *Secaucus v. Hudson County Board of Taxation*, 130 N.J. 393, 502, 614 A.2d 616 (N.J. 1993) (Pa22).

In its Jurisdictional Statement, the petitioner municipality alleges that the New Jersey Supreme Court judgment distinguishes these other statutory schemes.

In its second "Question Presented" "Jurisdictional Statement", petitioner Bayonne alleges to this Court that the New Jersey Supreme Court judgment distinguishing these other New Jersey "opt-out" statutory schemes, while striking down as a special act the exemption pursuant to N.J.S.A. 18A:54-37 has denied its citizens equal protection under the law.

Not only does the petitioner misstate the predicate facts and legal conclusions within this question presented, but as previously discussed, *infra*, the decision of the state court in this case devolved purely on issues of state law thereby presenting no federal question, but the petitioner as previously discussed, *infra*, lacks standing to raise the Fourteenth Amendment claims to this Court on behalf of its citizens.

By virtue of the similarity of analysis under New Jersey state law for evaluating general legislation and under federal equal

protection analysis to evaluate whether equal protection under the law has been afforded by the State as whether there is a reasonable basis on the classification or distinction in treatment, the New Jersey Supreme Court has already found the classification in the stricken statute to be arbitrary. So even if assuming *arguendo:* (i) that the Fourteenth Amendment were to be applied to municipalities in actions against the State; (ii) that the municipality were to have standing to raise the federal constitutional rights of its citizens; and (iii) that the state court action were to have been determined on other than state law, the multiple classifications by the stricken statute still were clearly not rationally related to its purpose. That after all was the substance of the New Jersey Supreme Court judgment. When applicable, the Fourteenth Amendment does not bar or invalidate all classifications if a legislative enactment does not regulate a semi-suspect or suspect class, the Fourteenth Amendment only prohibits invidious discrimination, against persons and classes of persons without rational basis as violations of equal protection and due process. *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491, *rehearing denied,* 398 U.S. 914, 90 S. Ct. 1684, 26 L. Ed. 2d 80 (1970); *Graham v. Richardson,* 403 U.S. 315, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1974); *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), *rehearing denied,* 429 U.S. 1124, 97 S. Ct. 1161, 51 L. Ed. 2d 574 (1977).

The due process clause of the Fourteenth Amendment cannot be invoked merely because the fairness of a legal conclusion is contested. *State v. Brown,* 41 N.J. 590 198 A.2d 446, (N.J. 1964), *cert. denied* ,377 U.S. 981, 84 S. Ct. 1888, 12 L. Ed. 2d 749; *State v. Garvin,* 44 N.J. 268, 208 A.2d 402, (N.J. 1965). The due process protections required by the Fourteenth Amendment comport with basic notions of fair treatment, substantial justice, and a determination of the controversy premised on the merits. *Murphy v. Helena Rubenstein Co.,* 234 F. Supp. 893, (D.C. N.J. 1964), *appeal dismissed,* 355 F.2d 533 (3rd Cir. 1964). Irrespective of

current claims under the federal Constitution, the record of the state case confirms absolutely that the petitioner was afforded fundamental fairness by the New Jersey courts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

FRANCES C. HOLLAND
HOLLAND & HOLLAND
Attorneys for Respondent
Town of Secaucus

DATED: January 28, 1994

APPENDIX A — OPINION — *SECAUCUS V. HUDSON COUNTY BOARD OF TAXATION, ET AL.*, DOCKET NO. L-094204-86PW (N.J. SUPER. CT. LAW DIV., JUNE 29, 1990)

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY
DOCKET NO. L-094204-86PW

SECAUCUS,

Plaintiff,

v.

HUDSON COUNTY BOARD OF TAXATION, COUNTY OF HUDSON, CITY OF BAYONNE, BOROUGH OF EAST NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWNSHIP OF NORTH BERGEN, CITY OF UNION CITY, TOWNSHIP OF WEEHAWKEN, and TOWN OF WEST NEW YORK,

Defendants.

Decided June 29, 1990

Frances C. Holland (Holland & Holland, attorneys) and Bernard Schenkler (Ravin, Sarasohn, Cook, Baumgarten, Fisch & Baime, attorneys) for plaintiff.

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Harry Haushalter, for defendant Hudson County Board of Taxation (Robert Del Tufo, Attorney General of New Jersey, attorney).

Kathleen M. Grant for defendant Hudson County (Robert E. Barry, Hudson County Counsel, attorney).

Robert F. Sloan for defendant Bayonne.

Libero D. Marotta for defendant East Newark.

Richard A. Bowe for defendant Guttenberg.

Eugene P. O'Connell for defendant Hoboken.

Mary Ann Murphy for defendant Jersey City
(Joseph Healey, Corporation Counsel).

Norman A. Doyle, Jr. for defendant Kearny (Doyle & Brady, attorneys).

Herbert Klitzner for defendant No. Bergen.

Joseph S. Sherman for defendant Union City (Acheson, Pelio & Scarinci, attorneys).

Le Roy D. Safro for defendant Weehawken.

Joseph A. Apicella for defendant, West New York.

HOPKINS, J.T.C., temporarily assigned.

This case brings for constitutional review *L.* 1973, *c.* 305, § 1, codified as *N.J.S.A.* 18A:54-37, which allows certain municipalities having their own vocational education programs to

be exempted from paying their proportionate share of county taxes allocable to county vocational schools. Specifically before this court is a challenge by plaintiff, Secaucus, alleging that the provision is unconstitutional legislation in violation of both Art. VIII, § 1, par. l(a), the uniformity provision, and Art. IV, § 7, par. 9, the special legislation prohibition, of the New Jersey Constitution (1947).

The statute in question, *N.J.S.A.* 18A:54-37, reads as follows:

> Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey Statutes, in any county of the first class having a population of not more than 700,000 according to the latest federal decennial census, each municipality included within a school district which has maintained for a minimum of 20 years a vocational education program approved for the purposes of federal or State allotment of vocational funds by the Commissioner of Education under the regulation of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.

As currently enacted, Bayonne is the sole municipality within the State eligible for exemption.

This matter was originally instituted by Secaucus challenging only the methodology utilized by defendant, Hudson County Board of Taxation (HCBT), to levy the county tax on

municipalities for added and omitted county tax revenues. Upon remand from the Appellate Division, the complaint was amended to allege the constitutional issues.

HCBT is the governmental agency responsible for apportioning the costs of county government, including the costs for the county vocational school, among the twelve municipalities in Hudson County. Initially, the County Board of School Estimates fixes an amount to be appropriated for county vocational school use for the ensuing year, exclusive of the amount to be received from the State. *N.J.S.A.* 18A:54-29 and -32. Once this amount has been certified under *N.J.S.A.* 18A:54-29.1, the Board of Chosen Freeholders:

> [S]hall, upon receipt of the certificate, appropriate, in the same manner as other appropriations are made by it, the amount so certified, *and the amount shall be assessed, levied, and collected in the same manner as moneys appropriated for other purposes in the county are assessed, levied, and collected, unless such amount is to be raised as otherwise hereinafter provided in this chapter.* [*N.J.S.A.* 18A:54-29.2.] [emphasis added]

To comply with both *N.J.S.A.* 18A:54-29.2 and *N.J.S.A.* 18A:54-37, HCBT developed a system whereby a two-tiered county rate was computed and applied to the various municipalities within Hudson County.[1] A county taxation rate is

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1. The twelve Hudson County municipalities which are parties to this proceeding are: Bayonne, East Newark, Guttenberg, Harrison, Hoboken, Jersey City, Kearny, North Bergen, Secaucus, Weehawken, West New York, and Union City. Harrison has defaulted.

normally determined once the budgetary needs of the county are tallied. The rate is determined per $100 of assessable property to meet those budgetary figures. Since assessment practices vary among the municipalities, the county tax burden of a municipality is based upon its equalized true value to the aggregate equalized true value of all the municipalities within the county.

The two-tiered county rate formulated was utilized to compute each municipality's proportionate share of the certified budgetary requirements for Hudson County, with the lower tier, which did not include the Hudson County Vocational School (HCVS) costs, applying to Bayonne. Thus, the two-tiered system enabled Bayonne to enjoy a lower county tax rate due to the statutory exemption. The proportionate amounts that the other eleven municipalities contributed to fund the county school absorbed Bayonne's exemption.

On February 15 of each year, municipalities must also pay to the county a share of the revenues derived pursuant to *N.J.S.A.* 54:4-63.1, *et seq.*, (added assessments of real estate), *N.J.S.A.* 54:4-63.12, *et seq.*, and *N.J.S.A.* 54:4-63.31, *et seq.*, (omitted assessments of real estate). These provisions prevent new properties constructed after the October 1 assessment date, or properties which were not included in the regular assessment list of October 1 for the tax year, from escaping taxation until the following year. Under *N.J.S.A.* 54:4-63.10,-63.22, and -63.38, the added or omitted property assessment list is multiplied by the county rate to calculate the sums due the county for added and omitted taxes.

The same two-tiered approach used for the regular assessment list was used when multiplying the added and omitted lists by the county rate. Bayonne's multiplier was the lower tier, reflecting its

exemption from funding the county vocational school, while the other municipalities paid the higher tier. None of these added or omitted tax revenues were segregated or allocated to funding the county vocational school, even though the two-tiered rate system was still being employed.

Suit was filed in Superior Court by Secaucus against the HCBT and the County of Hudson, alleging overpayment of county taxes in past years. On an Order to Show Cause before this court, it was held that the county rate applicable to added and omitted assessments in Secaucus included a portion applicable to the HCVS in Bayonne, and that such portions of the added and omitted taxes were to be placed in escrow to fund the vocational school in the next applicable budgetary year, rather than to be used for general county purposes. This procedure permitted the municipalities subject to the higher-tiered rate to recoup their excess payments in the following year's HCVS budget request.

Both plaintiff and defendants appealed that order. While acknowledging the discriminatory nature of the tax system used by defendants, the Appellate Division remanded the matter for failure to join the other affected Hudson County municipalities. It specifically declined to pass upon the validity of the trial court's remedy. By amended complaint, plaintiff challenged the constitutionality of the total statutory exemption enjoyed by Bayonne.

Kearny, East Newark, Union City, Weehawken and West New York join with Secaucus in its present motion for summary judgment. Bayonne and HCBT cross-move for summary judgment. No material issues of fact being present, this matter is suitable for summary judgment. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67 (1954).

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The legislative history of the disputed statute shows that *Senate Bill* 74, originally introduced for the 1972 Legislative Session, provided:

> 1. Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey Statutes, each municipality included within a school district maintaining a system of vocational education approved for the purposes of Federal or State allotment of vocational funds by the Commissioner of Education under the regulations of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.
>
> 2. This act shall take effect immediately.

The Senate Committee amendments to *Senate Bill* 74 (1972) limited the scope of the statute by adding, after the word "Statutes" in the second line, "in any county of the first class having a population of not more than 700,000 according to the 1970 Federal Census."

In lines 3 and 4, the phrase "maintaining a system of" was omitted, and the following phrase added, "which has maintained for a minimum of 20 years a." Also added to line 3 was the word "program" inserted after "education."

Thus, as enacted December 14, 1973, the changes were as follows:

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1. Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey Statutes, in any county of the first class having a population of not more than 700,000 according to the 1970 Federal Census, each municipality included within a school district which has maintained for a minimum of 20 years a vocational education program approved for the purposes of Federal or State allotment of vocational funds by the Commissioner of Education under the regulation of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.

2. This act shall take effect immediately.

As originally proposed, the bill sought to exempt from taxation amounts appropriated for the use of a county vocational school in *any* municipality which maintained a State or federally funded vocational school system. The amendment narrowed the original bill from all municipalities maintaining a "system of vocational education" by limiting its application to only those municipalities in a county of the first class having a population of not more than 700,000 which had maintained the program for a minimum of 20 years.

The statute was originally enacted as *L.* 1973, *c.* 305, § 1 and was amended by *L.* 1981, *c.* 462, § 20 by substituting "latest federal decennial census" for "1970 federal census."

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According to the 1970 and 1980 censuses, Hudson County fell within the requirements of *N.J.S.A.* 18A:54-37 as a county of the first class having a population under 700,000.

In 1970, Hudson County had a population of 607,839. *N.J.S.A.* 40A:6-1 then defined a county of the first class to be a "count[y] having a population of more than 600,000." Essex County and Bergen County, with populations of 932,526 and 897,148, respectively, were also counties of the first class, but were excluded from consideration under *N.J.S.A.* 18A:54-37 because their populations exceeded 700,000.

The 1980 census, however, showed a reduction in Hudson County's population to 556,972, jeopardizing its status as a county of the first class. The Legislature, by *L.* 1981 *c.* 462, § 44 amended *N.J.S.A.* 40A:6-1 to redefine a county of the first class as one "having a population of more than 550,000 and a population density of more than 3,000 persons per square mile." The provision for population density was a new criterion.

The following schedule shows the county population statistics as derived from the 1970 and 1980 census reports.

Counties	Population		
	1970	1980	Density per sq. mile
Atlantic	175,043	194,119	341.8
Bergen	897,148	845,385	3,567.0
Burlington	323,132	362,542	448.7
Camden	456,291	471,650	2,115.0
Cape May	59,554	82,266	312.8
Cumberland	121,374	132,866	266.8
Essex	932,526	851,116	6,701.7

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Gloucester	172,681	199,917	611.4
Hudson	607,839	556,972	12,108.1
Hunterdon	69,718	87,361	204.6
Mercer	304,116	307,863	1,356.2
Middlesex	583,813	595,893	1,885.7
Monmouth	461,849	503,173	1,066.0
Morris	383,454	407,630	865.5
Ocean	208,470	346,038	539.8
Passaic	460,782	447,585	2,393.5
Salem	60,346	64,676	191.3
Somerset	198,372	203,129	666.0
Sussex	77,528	116,119	221.2
Union	543,116	504,094	4,894.1
Warren	73,960	84,429	235.2

Under the reclassification, Hudson County retained its status as a county of the first class by virtue of its density of 12,108.1 persons per square mile. Bergen County also continued as a county of the first class with a population of 845,385 and a density of 3567.0, as did Essex County, which had a population of 851,116 with a density of 6701.7. However, Middlesex County, while surpassing Hudson County in population in the 1980 census with 595,893, had only a density of 1885.7, and did not qualify as a county of the first class.

Again, only Hudson County, with a population under 700,000, qualified under *N.J.S.A.* 18A:54-37, and only Bayonne, in Hudson County, had maintained a vocational education program approved for allotment of state or federal vocational funds for the requisite 20 years. Thus, Bayonne was the only municipality in the State which was exempt from county taxes used to support a county vocational school. Kearny, in Hudson County, would have qualified, except that its vocational school program had not been in effect for the reguisite 20 years.

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As noted, favored treatment required that a municipality have maintained, for a minimum of 20 years:

> a vocational education program *approved for the purposes of Federal or State allotment of vocational funds* by the Commissioner of Education under the regulation of the State Board of Education. . . . [emphasis added]

Federal funding of vocational education began as early as 1917 under the Smith-Hughes Act. *See* Legislative History of Pub. L. No. 94-482, *S. Rep. No.* 882, 94th Cong., 2d Sess. 42, reprinted in 1976 *U.S. Code Cong. & Ad. News*, 4713, 4753-54.

> In 1917 Congress enacted one of the earliest Federal grant programs, the Smith-Hughes Act. This legislation represented a milestone in the development of Federal aid to the States for education, incorporating provisions for the allocation of funds, State plans, development of State policymaking boards for the administration of education programs, matching requirements, and annual accountability reports to Congress. These are many of the same provisions carried through, in various forms, in present Federal education laws. The Smith-Hughes Act authorized $7 million for vocational education in agriculture, trades and industry, and home economics, and the training of teachers for these programs.

New Jersey enacted legislation as early as 1917 to accept federal funds. *N.J.S.A.* 18A:59-4. These funds are provided under

the Vocational Education Act of 1963, (Pub. L. 88-210, 77 Stat. 403), the 1976 amendments, and currently under the Carl D. Perkins Vocational Education Act, (Pub. L. 98-524, 98 Stat. 2435), 20 *U.S.C.A.* § 2301, *et seq.* These funds are accepted and distributed in accordance with *N.J.S.A.* 18A:59-4 & -5.

The requirement for apportionment or allotment of federal funds is derived from the federal legislation itself. Thus, pursuant to 20 *U.S.C.*§ 2302, Congress is required to appropriate the funds necessary for vocational education, and a formula is established for allotment of funds among the states. The procedure is described in *School Committee v. Mass. Dept. of Educ.*, 753 *F.* 2d 169, 171 (lst Cir. 1985), involving the substantially similar 1976 Act:

> The Act establishes a system of federal grant support for state and local vocational education programs, including post-secondary school programs. In order to receive grant money, a state must submit a three-year and five-year vocational education plan to the United States Department of Education detailing, among other things, what purposes the money is to serve and how it is to be allocated. If the state plan is approved by the United States Department of Education, the state receives federal funds. Local entities must apply to the Massachusetts Department of Education, for specific grants from the federal funds.

N.J.S.A. 18A:59-5 provides that the State Board of Education is the agency responsible for administration and supervision of the plan:

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> The state board is hereby designated as the state board for the purposes of said act of congress, and shall cooperate, as in the act provided, with the federal board for vocational education in the administration of the provisions thereof. The state board shall do all that is or may be required to secure for the state of New Jersey the benefits of appropriations under the act of congress for all purposes specified therein.

Further, Legislative History of Pub. L. No. 94-482, *S. Rep. No. 882*, 94th Cong., 2d Sess. 61, reprinted in 1976 *U.S. Code Cong. & Ad. News*, provides:

> The concept of the State board of vocational education as the sole State agency mandated by Federal law for the administration of vocational education programs has been a part of our nation's tradition since 1917. [at 4773]

The State Plan for Vocational Education FY 1989-1990 (June 1988) (State Plan) prepared by the Division of Vocational Education, provides that the Commissioner is the agent for the Board.

20 *U.S.C.A.* § 2322 mandates the establishment of a State council on vocational education. *N.J.A.C.* 6:41-2 created such a council. Further, 20 *U.S.C.A.* § 2323 requires federal approval of a State Plan. *N.J.A.C.* 6:43-1.1 provides that all vocational education in New Jersey shall comply with the State Plan.

> (a) Any vocational and technical educational program of less than college grade shall be conducted within the framework of a State Plan for Vocational and Technical Education approved by the State Board of Education and accepted by the United States Office of Education.

20 *U.S.C.A.* § 2325 provides for local applications for funding as follows:

> (a) Requirements; determination by State board
>
> Except as provided in subsection (c) of this section, any eligible recipient desiring to receive assistance under this chapter shall, *according to requirements established by the State board,* submit to the State board an application, covering the same period as the State plan, for the use of such assistance. The State board shall determine requirements for local applications (and amendments thereto), except that each such application shall—
>
> (1) set forth the vocational education programs, services, and activities proposed to be funded. . . . [emphasis added]

According to the 1985-86 Annual Report of the State Commissioner of Education, New Jersey received a total of $10,005,935 in federal funding. Newark alone received $923,139 of federal vocational funds. *1985-1986 Comm'r Educ. Rep. 35.* A

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computer list of federal funding by school district and by course, for 1987 and for 1988, produced by the Department of Education, shows that virtually every municipality receives at least some federal funds. 1988 computer list of Requested/Approved Funding by County produced by Bureau of Vocational Management Services, Department of Education.

In 1988, Bayonne qualified and was approved for federal funding for 13 courses, including marketing, auto body and data processing. Bayonne received over $300,000 in federal funds in 1988.

Jersey City was approved to receive in excess of $700,000 in federal funding for about 55 courses, including marketing, home economics, child care, cosmetology, carpentry, electronics and graphic arts. Kearny was approved to receive federal funds of approximately $50,000 for five courses in 1988. Even plaintiff, Secaucus, was approved to receive $19,000 in federal and state funds for two courses.

Newark, in Essex County, was approved to receive over $1.0 million in federal funds for approximately 60 courses in 1988. In Bergen County, New Milford was approved to receive some $4,000 in federal funds for two courses. Englewood received over $12,000 for three courses. Hackensack was approved to receive over $30,000 for four courses. Lyndhurst was approved to receive $45,000 for 13 courses. Elizabeth, in Union County, was approved to receive almost $400,000 in federal funds for 35 courses.

Thus, the Commissioner of Education (the designated representative under the State Plan) approves programs for allotment of federal funds, under regulation of the State Board of Education, *i.e.*, the State Plan promulgated by the Board.

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It can be said that virtually every municipality in New Jersey maintains:

> a vocational education program approved for the purposes of federal . . . allotment of vocational funds by the Commissioner of Education under the regulation of the State Board of Education. . . .

State categorical aid for vocational education is paid to designated "Local Area Vocational School Districts" (LAVSD). *N.J.A.C.* 6:46-2.1. To qualify for the LAVSD designation and funding, such districts must operate at least two programs in defined occupational areas such as agriculture, health, home economics, marketing or technical education; provide secondary education programs in trade; and comply with other administrative requirements. *N.J.A.C.* 6:46-2.3. A "program" is defined in *N.J.A.C.* 6:46-1 as "the planned sequence of courses, services or activities designed to meet a vocational objective." This definition was promulgated in 1982, after the 1973 enactment of *N.J.S.A.* 18A:54-37.

The LAVSD designation was established in 1982. *See Sen. Educ. Comm. Statement A No.* 1660, *L.* 1980, *c.* 102 to *N.J.S.A.* 18A:7A-1, *et seq.* The formerly designated Area Vocational Technical Schools had evolved from the 1963 Vocational Act. That act allocated funding, 50% from the federal government, 25% from the State and 25% from the district. Federal funds ran out in the mid-1970's, and funding for vocational education was effectively supplanted through chapter 212 of the Public School Education Act of 1975, *N.J.S.A.* 18A:7A-1, *et seq.*

Bayonne receives state categorical aid funding for vocational

education on account of its vocational education in its high school. Bayonne's school district is a designated LAVSD. The school district of Kearny, in Hudson County, is also a designated LAVSD, as are school districts in 16 other municipalities in the State.

The following shows the State funding for approved LAVSD's for 1985-1986:

Bayonne (Hudson)	$698,601
Black Horse Pike Regional (Camden)	483,131
Camden City (Camden)	841,502
Deptford Township (Gloucester)	264,643
Elizabeth (Union)	564,507
Hunterdon Central (Hunterdon)	335,258
Kearny (Hudson)	290,693
Linden (Union)	349,770
Lower Camden County Regional (Camden)	492,452
Matawan-Aberdeen (Monmouth)	361,022
Millville (Cumberland)	301,008
Morris Hills Regional (Morris)	412,700
North Hunterdon (Hunterdon)	476,362
Red Bank Regional (Monmouth)	160,350
Trenton (Mercer)	656,472
Union County Regional (Union)	249,434
Union Township (Union)	368,524
Willingboro (Burlington)	527,936

New Jersey also has other county vocational schools. *N.J.S.A.* 18A:54-11, *et seq.* According to the State Department of Education, as of September 1, 1988, there were 20 county vocational schools in existence. They are funded by the State, by virtue of *N.J.S.A.* 18A:7A-24, and also receive federal funds. To the extent they are not otherwise funded by State or federal

revenues, county vocational schools are funded by each county, which funding needs are "assessed, levied and collected in the same manner as moneys appropriated for other purposes in the County." *N.J.S.A.* 18A:54-29.2.

Most of the county vocational school districts, including Hudson County, also contain designated LAVSD's. Both Bayonne and HCVS are LAVSD's and receive State categorical vocational aid funding in addition to federal funds.

The HCVS commenced operations in its own facility in the 1974-1975 school year, although its Board of Education was first constituted in 1965. Its records for 1972 show a resolution directing negotiations for the acquisition of a school building. A budget estimate for approximately $2.0 million was prepared in early 1973. It was at that time that the subject statute was enacted.

Since at least the early 1930's, Bayonne has maintained a vocational education program. Initially, its vocational program was operated through a separate vocational high school. By the 1960's, the vocational program had become fully integrated with Bayonne's comprehensive high school. There is no "vocational education" student, *per se*. In Bayonne's vocational program, long considered a model, vocational education students fully participate in school activities with other students and attend many classes with non-vocational education students.

There is no prohibition against Bayonne students or residents from attending HCVS.

On February 15 of each year, in addition to the regular installments of county taxes, a municipality must pay to the county an amount determined by multiplying the total of added or omitted

assessments "by the county . . . rate." *N.J.S.A.* 54:4-63.10, 63.22, 63.38. The added and omitted assessment statutes, discussed *supra*, all provide that each municipality must pay a portion of its added and omitted assessment taxes to the county. These amounts were paid at the two-tiered rate.

The parties have stipulated that no part of the funds paid to Hudson County on account of added and omitted assessments are segregated for or paid for the use of the county vocational school. All of the county taxes attributable to the added and omitted taxes became part of general funds used to fund Hudson County general expenditures. By reason of the two-tiered county rate, Bayonne taxpayers were exempted from paying the same portion of the taxes resulting from the added or omitted assessments, even though all such funds were used for general county government purposes.

The constitutional provisions restricting legislative enactments exempting local real property from taxation are expressed in *N.J. Const.* (1947) Art. VIII, § 1, par. 1(a) and par. 2, which read as follows:

> 1. (a) Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.
>
> * * * *

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> 2. Exemption from taxation may be granted only by general laws. Until otherwise provided by law all exemptions from taxation validly granted and now in existence shall be continued. Exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit.

The leading case on the construction to be given to the above constitutional provisions is *N.J. State League of Municipalities v. Kimmelman*, 105 *N.J.* 422 (1987). That case involved the constitutionality of a statute which prohibited newly constructed single-family dwellings from being added to real property assessment lists until a certificate of occupancy had been issued and the dwelling had actually been occupied. The court reviewed the history of the constitutional paragraphs to show the intent of the framers before concluding that the statute violated both the uniformity provisions of Par. 1(a) and the requirement that exemptions be granted only by general laws, as contained in Par. 2.

In so doing, the court recognized the constitutional limitations on taxation, as well as the cases construing those limitations prior to the 1947 Constitutional Convention. Such background was necessary to fully implement the constitutional requirement that all real property shall be assessed according to the same standard of value and taxed at the general tax rate of the taxing district.

It was pointed out that for almost 75 years, the New Jersey

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Legislature and the courts, in the development of tax policy, were guided by the provisions of the 1844 New Jersey Constitution, Art. IV, § 7, par. 12, which read as follows: "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

In its review, the court relied heavily upon a monograph by Aaron K. Neeld, contained in 2 *Proceedings of the State of New Jersey Constitutional Convention of 1947*, 1685 (S. Goldman & H. Crystal, ed. 1951), for the history of that tax policy. It was pointed out that all taxes are state taxes, even though levied for county and municipal purposes, and that such power, an essential attribute of sovereignty, is unlimited in scope except as may be restrained by constitutional inhibition or irrepealable legislative contract. Under the 1844 Constitution, class taxation was valid, as long as there was compliance with the classification rule that all reasonably within the class were included, that uniformity prevail throughout the whole class, and that the property be taxed at true value. However, it was regularly held that classification must be of *property* according to its characteristics, or the use to which it is put and not according to the status of the owner or the mere incidence of location of the property. Relying upon Neeld's *Proceedings, supra,* the court further stated that the 1844 Constitution tax clause did not require that *all* property shall be assessed for taxes. Rather, the Legislature could classify properties for purposes of exemption from taxation, subject always, of course, to strict observance of the classification rule. Elimination of a single member of the natural class would invalidate the statute. *See League, supra,* at 428-429.

In support of those principles, the court also pointed out that an attempted special exemption of $500 for firemen had been voided on the ground that instead of classifying property for the purpose of exemption, either by characteristics or by its uses, the

legislation classified the owners of the property according to characteristics possessed by them, regardless of the characteristics possessed by the property and of the uses to which it was put. *Tippett v. McGrath*, aff'd 71 *N.J.L.* 338 (E. & A. 1904). Further, an attempt to exempt new improvements of real property for a period of five years had also been voided on the basis of improper classification. *Koch v. Essex County Board of Taxation*, 97 *N.J.L.* 61 (Sup. Ct. 1922), and *Braunstein v. Jersey City*, 98 *N.J.L.* 478 (E. & A. 1923). Continuing, the court pointed out that subsequently, an exemption by classification had been held valid for purposes of industrial encouragement. *Schwartz v. Essex County Bd. of Taxation*, 129 *N.J.L.* 129, 133 (Sup. Ct. 1942), aff'd 130 *N.J.L.* 177 (E. & A. 1943), and *Burlington Distilling Co. v. State Board of Assessors*, 86 *N.J.L.* 92 (Sup. Ct. 1914), aff'd 87 *N.J.L.* 315 (E. & A. 1915). This latter construction formed the basis for the preferential tax treatment of railroads when the Railroad Tax Law was revised to dedicate the proceeds of second class railroad taxes to municipalities, but the rate of property taxation was fixed at only 3% per $100 value, notwithstanding the fact that the figure was well below the average tax rate for the State. *See Jersey City v. Kelly*, 134 *N.J.L.* 239 (E. & A. 1946), modifying *Jersey City v. State Board of Tax Appeals*, 133 *N.J.L.* 202 (Sup. Ct. 1945). Such favorable treatment was judicially approved on the basis that it was a permissible means to "ease and make more flexible the burden of taxation of railroad property." *State v. State Board of Tax Appeals*, 134 *N.J.L.* 34, 41 (1946), aff'd o.b., 135 *N.J.L.* 482 (E. & A. 1947)

The favored treatment of railroads was the subject of much discussion at the 1947 Constitutional Convention. The State League of Municipalities there took the position that the judicial approval of the railroad legislation was the first such approval since the adoption of the tax clause in the Constitution of 1875, and that the courts now construed that clause to permit the Legislature

not only to segregate real property for valuation purposes, but also to deliberately assess it at a lower rate than that paid by other property.

It was against this background that the present uniformity and exemption clauses were promulgated. Again, as shown in the *League* case, the political compromise that evolved was that there would be a deletion of the true value requirement from the tax clause. However, the Constitution would require that as to the taxation of real property, then and now the lifeblood of local government, discriminatory burdens would be forever barred. *League* at 433. After considering all of the above, the *League* court held that it was required to reconcile the restraint on the power of the Legislature, as imposed by the uniformity and general exemption clauses, with the power to grant exemptions. It achieved this reconciliation by recognizing that when the delegates dealt with the exemption power, "they considered it as being exercised in the historical mold of the public purpose — then seen primarily as educational, charitable and religious purposes." *League* at 435.

The court then stated:

> [G]iven that the single galvanizing event that brought about the agreement on a tax article was a compromise that gave greater flexibility to the executive and legislative branches in taxing all types of property other than real estate, with the apparent purpose of providing that real property dedicated to municipal tax purposes should never be taxed at an unequal burden, we cannot conclude that the delegates intended that the Legislature

> could achieve, by the exemption clause, what could not be done under the constitutional restraints imposed upon it. For no matter whether viewed as a classification or as an exemption, it is clear that the purpose of the challenged provision is to aid an ailing industry. [at 436]

The court went on to point out that prior judicial decisions were consistent in upholding the constitutional provision against preferential property tax treatment. *See Switz v. Kingsley,* 37 *N.J.* 566 (1962), holding unconstitutional preferential property treatment for qualifying farmlands by assessing such property at its value for agriculture, rather than at its fair market value. Subsequently, the Constitution was amended to permit such favored treatment.

The *League* court, based upon the history of the uniformity clause, found that it was enacted for the purpose of providing that real property dedicated to municipal tax purposes should never be taxed at an unequal burden and that the exemption clause could not be used to undermine that proscription.

The subject statute specifically excludes Bayonne property owners from that portion of Hudson County property taxation used to support the HCVS. By statute, except as to the subject exemption, all local property must be taxed, at its equalized value, to support county government, including county vocational schools. *N.J.S.A.* 18A:54-29.2, *N.J.S.A.* 54:4-41 and -47. The subject statute authorizes a disparate treatment in the taxation of other Hudson County municipalities for the benefit of Bayonne's property owners. This favorable status is based on the "mere incidence of location." *League* at 429. *See N.J. Turnpike Authority*

v. Washington Tp., 16 *N.J.* 38 (1954), requiring that an exemption can only be justified on the basis of the *use* of the property. The uniformity clause prohibits favored treatment in the taxation of real property, regardless of a legislatively determined justification. Under those circumstances, *N.J.S.A.* 18A:54-37 is in conflict with the uniformity clause and is invalid.

Plaintiff also attacks the subject statute as special legislation creating an unnatural and arbitrary classification specifically for Bayonne and excluding similarly situated municipalities which, except for their failure to meet the county population provisions and failure to have maintained a vocational education program for 20 years, would have been eligible for the tax exemption.

The uniformity clause requires property to be assessed by general legislation and Art. IV, § 7, par. 9 (6) specifically prohibits any special legislation relating to taxation or exemption therefrom. Special legislation is described in 73 *Am.Jur. 2d Statutes* § 6 (1964), as follows:

> Ordinarily, a statute is regarded as a "special law" if it does not have a uniform operation. Within the meaning of this rule, a statute does not have a uniform operation if it does not relate to persons, entities, or things *as* a class, but to particular persons, entities or things *of* a class. A classification renders a statute special where it is made to depend, not upon any natural, real, or substantial distinction, but rather upon purely artificial, arbitrary, illusory, or fictitious conditions, so as to make the classification unreasonable and unjust. Sometimes, it is said that a law is

> special where its classification is not based upon some reasonable and substantial difference in kind, situation, or circumstance bearing a proper relation to the purpose of the statute, but embraces less than the entire class of persons to whose condition such legislation would be necessary or appropriate, having regard to the purpose for which the legislation was designed. [emphasis added]

Plaintiff does recognize that it has the burden to demonstrate clearly that the statute violates the constitutional provisions and that there is a presumption of constitutionality. *Mahwah Tp. v. Bergen County Bd. of Taxation*, 98 *N.J.* 268, 282 (1985), *cert.* den. 471 *U.S.* 1136, 105 *S. Ct.* 2677, 86 *L.Ed.2d* 696 (1985), which is the latest Supreme Court opinion discussing special legislation in the context of taxation, is particularly instructive in the principles to be utilized in reviewing a statute for that deficiency. At issue there was *N.J.S.A.* 54:4-5, *L.* 1922, *c.* 130, which provided a rebate of a portion of a municipality's share of county taxes if the municipality was located in a first class county with a population in excess of 800,000, and had within its borders 200 acres or more of land used and occupied by a state or county institution. The act's purpose, as originally enacted, was stated by the Legislature as follows:

> This bill is proposed to correct an injustice to the Township of Cedar Grove wherein the Overbrook Hospital is situated. The township is compelled to furnish tuition to the children of various officials and attendants employed there, and is also compelled to record the vital statistics and to furnish protection to the inhabitants of said hospital, without receiving

a dollar in return. (Statement 3, accompanying P.L. 1918 p. 8471) [*Mahwah* at 275]

In holding the statute, as originally enacted, to be constitutional, the court emphasized certain principles. First, a statute is presumed to be constitutional and will not be declared void unless the statute is clearly repugnant to the Constitution. Further, citing from *In re Loch Arbour*, 25 *N.J.* 258, 265 (1957), the court stated that "[a]dded force is given to these basic concepts by the further policy of our law not to invalidate a statute which has been in force without a substantial challenge for many years, unless its unconstitutionality is obvious." *Id.* at 282.

The second principle is that the burden is on the party challenging the constitutionality of the statute to demonstrate clearly that it violates a constitutional provision. *Mahwah* at 283. The last principle, one that is of longstanding validity, is that in deciding whether an act is special or general legislation, the determining factor is what is excluded, not what is included.

It then adopted the three-pronged test set forth in *Vreeland v. Byrne*, 72 *N.J.* 292 (1977). This test includes consideration of the purpose and object of the legislation, examination of the factual situation under review in order to determine whether any one thing is excluded that should be included, and lastly, determination of whether the resulting classification can be said to rest upon any rational or reasonable basis relevant to the purpose and object of the act.

Applying the above principles to the subject statute, its history shows that as first proposed, it was applicable to any municipality included within a school district maintaining a system of vocational education approved for the purposes of federal or state

allotments of vocational funds by the State. However, as finally enacted, it was restricted to municipalities in those first class counties having a population of not more than 700,000 according to the 1970 federal census, which municipalities had maintained, for a minimum of 20 years, a vocational education program approved to receive federal or state vocational funds. Only Hudson County gualified as a county of the first class with a population less than 700,000, and only Bayonne qualified as having a vocational program in existence for the minimum 20 years. The Senate Education Committee Statement to *Senate Bill* 74 (1972) left no doubt as to the legislative intent:

> This bill, as amended, would exempt the city of Bayonne from any assessment of taxes due to the cost of supporting the county vocational school in Hudson County.

The statute was amended in 1981 to substitute "latest Federal decennial census" for "1970 Federal census."

At the same time, by *L.* 1981, *c.* 462, § 44, *N.J.S.A.* 40A.6-1, the definition of a first class county was revised from a county having a "population of more than 600,000" to a county having a "population of more than 550,000 and a density of more than 3,000 persons per square mile." This change in the definition of a first class county must be reviewed in the context of the 1980 census showing that Hudson County's population had decreased from 607,839 in 1970 to 556,972 in 1980. As such, without the amended definition, Hudson County would have lost its status as a first class county as of 1980. Further, in reducing the required population number, the Legislature also added the population density per square mile standard for which Hudson also qualified. Although Middlesex County had a larger total population, it could not meet the density requirement.

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Bayonne continued to be the only school district qualifying under the subject statute, and only Bayonne taxpayers enjoyed the exemption from contributing to county vocational schools.

It is recognized that if the classification is otherwise valid, it is not rendered invalid by the fact that it applies to only one city in the state. A statute is not unconstitutional special legislation merely because it addresses the needs of a particular municipality or serves a particular legislative purpose. *Mahwah* at 285. Accordingly, the legislators' motivation in adopting the subject statute in order to ameliorate the perceived hardship of Bayonne in 1971, and their efforts to continue that relief in the amendments in 1981, may not be fully determinative of the constitutionality of the statute inasmuch as other school districts could come within its scope. However, the history here shows that such was not the case and the restrictions, particularly having such programs in existence for at least 20 years, would make it unlikely that any school district would qualify until some time in the future. Indeed, the record reflects that except for the 20 year restriction, Kearny would qualify, since it is located in Hudson County but had its program in effect for only 6 years in 1986. That feature, together with the general recognition of the need to encourage vocational education programs, requires a finding that the statute was specifically drafted not only to include Bayonne, but, in such restrictive terms, as to make it highly unlikely that any other equally impacted school district could qualify within any reasonable period of time.

The final prong of the *Vreeland* test is whether the act rests upon a rational basis justifying the classification.

Classification by population, however, must be analyzed with the following "bottom line" as noted in *In re Loch Arbour, supra,* citing *Paul v. Gloucester County,* 50 *N.J.L.* 585, 592 (E. & A. 1888):

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> The extreme limit of our inquiry in this direction is, Does population bear any reasonable relation to the subject to which the legislature has applied it: is it germain [sic] to the law?

In *Mahwah*, as well as in *Newark Superior Officers Ass'n., et al., v. Newark, et al.*, 98 *N.J.* 212 (1984), the court held that a statute based upon a population classification was not invalid, *per se*. It there pointed out that cities with larger populations had specific problems which could very well be addressed without giving the same remedy or relief to lesser populated cities. The same would apply to populations between various numbers where those numbers would represent a population criterion reasonably associated with the restricted application of the legislation.

As noted in *Mahwah*, the case of *Owens v. Fury*, 55 *N.J.L.* 1 (Sup. Ct. 1892), upheld a statute transferring the greater part of the appointive powers of common councils to the mayor in cities with populations between 50,000 and 100,000. Emphasizing the distinction between the greater public concern for such offices in cities of more than 50,000, the court found the classification to have a rational basis. However, in *Raymond v. Teaneck*, 14 *N.J. Misc.* 487, 490 (Sup. Ct. 1936), aff'd 118 *N.J.L.* 109 (E. & A. 1937), the court considered legislation that fixed the tenure of tax assessors and limited it to cities of a population no less than 135,000 and no more than 200,000. The court there stated:

> [W]e cannot discover any sound reason why one body of assessors or one type of assessor should be continued in office in a given locality of the state and another performing the same service and holding the

> same office should be excluded. If continuance in office because of experience, security in office and freedom from political influence be desirable in a population up to one hundred and thirty-five thousand, it is difficult to understand why it should not be desirable in a population of from one hundred and thirty-five thousand to two hundred thousand or over three hundred thousand, and if desirable respecting assessors generally, why not equally desirable when the assessment is by commissioners of assessment in the excluded municipalities. . . .

Also, population was held not to be a reasonable classification in *Koons v. Atlantic City,* 134 *N.J.L.* 329 (Sup. Ct. 1946), aff'd o.b. 135 *N.J.L.* 204 (E. & A. 1947). In that case, a retail sales tax was authorized for any city with a population in excess of 50,000 and bordering on the Atlantic Ocean. The legislative purpose was to assist Atlantic City in recovering from recent hurricane damages. The court, however, found that other shore municipalities had also been damaged by the hurricane, and were improperly and artificially excluded by the statute.

The above principles are equally applicable here. The maintenance of a vocational education program by a municipal school system, which also contributes to a county vocational school, if a hardship, is a widespread one which is not restricted by a population criterion. Bayonne, or any other municipality that could possibly meet the statutory requirements, represent only a fraction of the municipalities with the same common problem. There are some 20 county vocational schools in the State and numerous school districts with qualified vocational education

programs. The perceived evidence of double contribution cannot be measured, in its impact. by population restrictions. The classification by population, including population density per square mile, effectively excludes the many municipalities with the same perceived hardship. As such, *N.J.S.A.* 18A:54-17 also violates the constitutional proscription against special legislation.

It is concluded that the subject statute fails constitutional muster both under the uniformity clause and as special legislation.

The issue originally presented to the court was whether the statute should have been construed to require the HCBT to compute another county tax rate for the added and omitted assessment taxes paid by the non-Bayonne municipalities, in order to permit these municipalities to retain those second-tier amounts. Secaucus requests this remedy. The county, in turn, wishes to continue the procedure, presently in existence, whereby the money is paid to the county, and the county uses the funds for general purposes.

This court, at the first hearing, found that the methodology through which the county kept such funds for general county purposes resulted in a discriminatory treatment of the non-Bayonne municipalities in that such additional payments by them for general county purposes discriminated in favor of Bayonne taxpayers. That holding was based upon the principles enunciated in *Clifton v. Passaic County Board of Taxation*, 28 *N.J.* 411 (1958), and the well-established principle that there is only one county tax rate, even though, as in this case, it was a two-tiered rate. The county collection of funds received from the second-tier rate as applied to added and omitted assessments and their use for general purposes evidence discrimination in favor of Bayonne.

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In statutory construction, it is important that the legislative policy be kept in mind. *Clay v. East Orange*, 177 *N.J. Super.* 79, 84 (Law Div. 1980), aff'd 181 *N.J. Super.* 40 (App. Div. 1981), aff'd 91 *N.J.* 429 (1982). That case relied upon *New Capitol Bar & Grill Corp. v. Div. of Employment Security*, 25 *N.J.* 155 (1957), where the court stated:

> It is frequently difficult for a draftsman of legislation to anticipate all situations and to measure his words against them. Hence cases inevitably arise in which a literal application of the language used would lead to results incompatible with the legislative design. It is the proper function, indeed the obligation of the judiciary to give effect to the obvious purpose of the Legislature, and to that end "words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms." *Alexander v. New Jersey Power & Light Co.*, 21 *N.J.* 373, 378 (1956); *Wright v. Vogt*, 7 *N.J.* 1, 6 (1951); *Glick v. Trustees of Free Public Library*, 2 *N.J.* 579, 584 (1949). Additionally, the statute before us is remedial and should be liberally construed to accomplish the social aim of the Legislature. *Campbell Soup Co. v. Board of Review, Division of Employment Security*, 13 *N.J.* 431 (1953) [at 160]

The above principles were also used in *Robson v. Rodriquez*, 26 *N.J.* 517, 528 (1958) and *Clifton v. Passaic Tax Bd., supra.*

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Applying those principles, it is obvious that the legislation was directed to relieve Bayonne-type municipalities from contributing to county vocational schools. It was never intended that Bayonne obtain the extra benefit of also receiving favorable treatment in the payment of Hudson County's general operating costs. This is the basis of Secaucus' complaint. However, as there is only one annual tax rate, appropriate construction, in furtherance of the legislative policy, would be to make certain that the second-tier payments from added and omitted assessments are utilized to confine Bayonne's favored treatment in contributing to the HCVS budget. In order to avoid discriminatory treatment in favor of Bayonne, to maintain the validlty of one county tax rate, and to ensure that taxes paid as HCVS costs are used for such purpose, the statute should be expanded to provide that such extra payments be used to reduce the HCVS budget impost for the following year. By earmarking such funds for that purpose, the following year's HCVS budget, as funded by the non-Bayonne municipalities, will be reduced and the discriminatory practice corrected.

Relief will be granted to the plaintiff and similarly situated Hudson County municipalities by application of the excess two-tiered payments to the HCVS budget commencing with the year subsequent to the filing of the original complaint in 1986. Full relief from the unconstitutional statute will commence with the elimination of the two-tiered county rate commencing with the county rates determined subsequent to May 27, 1988, the filing date of the motion to amend the complaint to allege the unconstitutionality of *N.J.S.A.* 18A:54-37. *See Alfred Vail Mutual Assoc. v. Halpin*, 107 *N.J. Super.* 517, 533-534 (App. Div. 1969), aff'd 58 *N.J.* 40 (1971).

Plaintiff will submit a proposed form of judgment pursuant to the five-day rule in accordance with the above.

APPENDIX B — ORDER GRANTING SUMMARY JUDGMENT — *TOWN OF SECAUCUS V. HUDSON COUNTY BOARD OF TAXATION, ET AL.*, DOCKET NO. L-094204-86 PW (N.J. SUPER. CT. LAW. DIV., JULY 27, 1990)

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

Docket No. L-094204-86 PW

CIVIL ACTION

TOWN OF SECAUCUS,

Plaintiff,

- vs -

HUDSON COUNTY BOARD OF TAXATION, COUNTY OF HUDSON, CITY OF BAYONNE, BOROUGH OF EAST

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NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWN OF NORTH BERGEN, CITY OF UNION CITY, TOWN OF WEEHAWKEN, and TOWN OF WEST NEW YORK,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER having been presented to the Court by Holland & Holland, P.C., (Frances C. Holland, Esq. appearing) and Ravin, Sarasohn, Cook, Baumgarten, Fisch & Baime, (Bernard Schenkler, Esq. appearing), co-counsel to Plaintiff, Town of Secaucus, in the presence of Robert Del Tufo, Attorney General (Harry Haushalter, Deputy Attorney General appearing); Kathleen M. Grant, Esq., Assistant Hudson County Counsel; Robert F. Sloan, Esq., attorney for defendant Bayonne; Libero D. Marotta, Esq. attorney for defendant East Newark; Richard A. Bowe, Esq., attorney for defendant Guttenberg; Eugene O'Connell, Esq., attorney for defendant Hoboken; Mary Ann Murphy, Esq., attorney for defendant Jersey City; Norman A. Doyle, Esq., attorney for defendant Kearny; Herbert Klitzner, Esq., attorney for defendant North Bergen; Joseph S. Sherman, Esq., attorney for defendant Union City; Le Roy D. Safro, Esq., attorney for defendant Weehawken; and Joseph A. Apicella, Esq., attorney for defendant West New York; on a motion for summary judgment, and the Court having considered the moving and opposing papers and argument of counsel and for the reasons set forth in a written opinion dated June 29, 1990, and good cause being shown;

IT IS on this 9th day of August 1990;

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ORDERED, that summary judgment be and hereby is granted in favor of Plaintiff as follows:

1. *N.J.S.A.* 18A:54-37 be and hereby is declared unconstitutional and invalid under the uniformity clause of the Constitutional, Art. VIII Sec. 1 and under the constitutional proscription against special legislation, Art. IV., Sec. 7, Par. 9(6).

2. The methodology utilized by the defendant Hudson County Board of Taxation pursuant to *N.J.S.A.* 18:54-37 to collect the second-tier county tax from the non-Bayonne municipalities for added and omitted assessments and to retain and use the additional funds for general county purposes be and hereby is invalidated as discriminatory in favor of defendant Bayonne and said invalidation applies to applications of excess two-tiered payment to the general county budget commencing with the tax year 1986; and

3. The Hudson County Board of Taxation shall calculate the amount collected from the eleven Hudson County municipalities other than Bayonne on account of added and omitted assessments between 1986 and May 27, 1988, and calculate the reduced amount which should have been due and payable from the eleven Hudson County municipalities, other than Bayonne, had the added and omitted assessment tax proceeds been segregated and applied to reduction of the subsequent tax year's County Vocational School Budget. the Hudson County Board of Taxation shall further calculate any reallocation of the apportionment of the Hudson County Budget among all twelve municipalities including Bayonne. Any debits and credits shall be set forth in the 1990 Hudson County Abstract of Ratables to be adopted by the Hudson County Board of Taxation; and

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4. The Hudson County Board of Taxation shall calculate as a debit of Bayonne its proportionate share of the cost of the budget of the Hudson County Vocational School from and after May 27, 1988 and the resultant credits to the remaining eleven Hudson County municipalities for over-payments on for the budget of the Hudson County Vocational School from or after May 27, 1988. Any such debits and credits shall be set forth in the 1990 Hudson County Abstract of Ratables to be adopted by the Hudson County Board of Taxation; and

5. For the tax year 1990 and thereafter, the two-tiered system implemented by the Hudson County Board of Taxation under *N.J.S.A.* 18:54-37 is abolished and the cost of funding the Hudson County Vocational School shall be included in the general county budget. Hudson County taxes shall be apportioned among the twelve municipalities in the 1990 Hudson County Abstract of Ratables by the Hudson County Board of Taxation according to a single county rate and in every tax year thereafter is to be so apportioned in the Hudson County Abstract of Ratables.

s/ John J. Hopkins
Hon. John J. Hopkins, J.T.C. t/a

APPENDIX C—OPINION – *TOWN OF SECAUCUS V. HUDSON COUNTY BOARD OF TAXATION AND COUNTY OF HUDSON,* DOCKET NO. A-4854-86T8 (N.J. SUPER. CT., APP. DIV., MAY 18,1988)

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATEDIVISION
A-4854-86T8

TOWN OF SECAUCUS,

Plaintiff-Appellant-
Cross-Respondent,

v.

HUDSON COUNTY BOARD OF TAXATION AND COUNTY OF HUDSON

Defendant-Respondents-
Cross-Appellants.

Argued February 29, 1988 — Decided May 18, 1988

Before Judges O'Brien, Havey and Stern.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County.

Bernard Schenkler argued the cause for appellant-cross-respondent (Holland & Holland, and Ravin, Sarasohn, Cook,

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Baumgarten, Fisch & Baime, attorneys; Lewis M. Holland on the brief and Bernard Schenkler on the reply brief).

Harry Haushalter, Deputy Attorney General, argued the cause for respondents-cross-appellants (W. Cary Edwards, Attorney General of New Jersey, attorney for respondent-cross-appellant, Hudson County Board of Taxation; Michael R. Clancy, Deputy Attorney General, of counsel; Mr. Haushalter on the brief).

Respondent-cross-appellant Hudson County relies on the brief submitted by the Attorney General.

PER CURIAM:

This appeal and cross-appeal challenge a ruling by the Law Division relating to how property tax revenue from added and omitted assessments should be fixed and allocated. Defendants Hudson County and the Hudson County Board of Taxation (County Board) challenge the trial court's ruling "that the carry-over of [the general tax rate] to the added and omitted assessments and the ability and the actual use of the total amount paid to the County on that at [the general tax rate] creates an undue burden on non-Bayonne municipalities." All parties challenge the consequent judgment entered which provides that "that portion of added and omitted taxes received by Hudson County from the Hudson County municipalities reflective of the Hudson County Vocational School rate component shall be utilized solely for funding the Hudson County Vocational School," and that "[t]hat

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. . . portion of the added and omitted taxes collected by the county and applied solely for funding the [school] shall be deducted from the amount of monies needed to be raised through the local property tax levy in that tax year for the [school]."

Plaintiff appeals from the remedy embodied in the judgment and defendants cross-appeal. We reverse and remand for further proceedings.

The dispute in this case flows from the fact that taxpayers of Bayonne, which has its own vocational school, have been exempted by statute from contributing to the funding of the Hudson County Vocational School, which is funded from the county budget. *See N.J.S.A.* 18A:54-37.

As a consequence of the exemption, municipalities other than Bayonne, including plaintiff Town of Secaucus, must contribute for a county service not paid by Bayonne taxpayers, and the general tax rate for the municipalities other than Bayonne is higher than the general tax rate for Bayonne.

I.

The Hudson County Board of Taxation created a two-tier rate based on Bayonne's exemption. With respect to regular assessments, the municipalities other than Bayonne pay property taxes based on a rate for their share of county taxes, and a separate additional amount, calculated by using a separate rate, which exclusively funds the county vocational school. Bayonne, by reason of the statutory exemption, pays its taxes based on the "county rate" without regard to the vocational school. Consequently, its "county rate" is lower than the rate for the other 11 municipalities.

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Plaintiff instituted this action by complaint in lieu of prerogative writs in the Law Division seeking exclusion of the County Vocational School costs from the rate used for added and omitted assessments. Plaintiff challenged the county board's decision to employ a "county rate" for added and omitted assessments consisting of the rate applicable to each municipality including county taxes and the separately delineated rate for the county vocational school budget utilized outside of Bayonne. Plaintiff claimed that the system is unauthorized by statute and is unfair to all of the municipalities in Hudson County except Bayonne, because it required them to pay more than their fair share to the county and because the added and omitted assessments do not apply to defray the costs of the county vocational school. Thus, it claimed that the added and omitted statutes should not include the component representing the county vocational school.

The Law Division agreed that the present method unfairly discriminated against non-Bayonne municipalities, but the judge declined to construe the statutes in the manner urged by plaintiff. Rather, he fashioned a remedy which in effect required the county to escrow or set aside in a separate fund that portion of added and omitted assessments revenue attributable to the rate fixed for the vocational school budget.

No party is satisfied with this result. Plaintiff and defendants argue that there is no statutory authority for what the judge did. Plaintiff claims the judge should have adopted its suggested remedy, namely interpreting the "county rate" as not including that rate for the vocational school. Defendants urge that there was no reason for the judge to change the existing system in the absence of additional legislation on the subject. They contend that the present system is contemplated by the existing legislation.

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II.

We initially reject defendants' claim that the complaint is untimely as filed more than 45 days after the county board notified plaintiff of its obligations with respect to the added and omitted assessment for 1987. While plaintiff sought credits for overpayments from prior years against the 1987 assessment, it also sought declaratory relief for future years, and the case involves substantial and recurring issues of public importance and constitutional law. *See R.* 4:69-6(c) (enlargement of time "where it is manifest that the interest of justice so requires"). *See also Reilly v. Brice*, 109 N.J. 555 (1988); *Schack v. Trimble*, 28 N.J. 40 (1958). We also reject defendants' further contention that review of a decision by the county board of taxation must be filed in the Tax Court. While the action in lieu of prerogative writs was properly before the Law Division, the case was properly assigned to a judge of the Tax Court temporarily assigned to the Law Division to hear this case. *See Alid., Inc. v. Town of North Bergen*, 89 N.J. 388 (1981). Moreover, the judge noted that it was being consolidated, with a case then pending in the Tax Court involving the same parties and seeking the same relief.[1]

III.

On February 15 of each year a municipality must, in addition to the regular installment of county taxes, pay to the county an amount determined by multiplying the total of added or omitted assessments "by the county . . . rate." *N.J.S.A.* 54:4-63.10, 63.22,

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1. The judge also noted that the matter was being consolidated with a matter subsequently filed in the Tax Court seeking reduction of the 1987 rate and declaratory relief. We note that, if not already accomplished, the judge can perfect the consolidation on remand.

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63.38. However, the statutes do not define the phrase "county rate." Thus, the issue is whether to construe the phrase "county rate" as applying merely to the rate for county expenditures common to all municipalities and their taxpayers, as plaintiff urges, or the rate for county expenditures including those related to the county vocational school, as urged by defendants.

The obligation of the trial court is to interpret what the legislature meant by the phrase "county rate" in these circumstances. *County of Bergen v. Borough of Paramus*, 79 *N.J.* 302, 306 (1979). As the judge noted, it has long been held that the overall goal of the Legislature is to apportion the cost of county government among its constituent municipalities as equally and as impartially as possible. *Clifton v. Passaic County Board of Taxation*, 28 *N.J.* 411, 418 (1958). Absolute equality is a practical impossibility, but it is the duty of the county board to minimize as far as possible the unfair distribution of county taxes among constituent municipalities. *City of Passaic v. Passaic County Bd. of Taxation*, 18 *N.J.* 371, 381 (1955). *Clifton v. Passaic County Board of Taxation*, *supra*, applied that principle in ascertaining what should be the proper "county rate" for purposes of added and omitted assessments where the issue related to the standard of value. 28 N.J. at 420.

Thus, the "county rate" for Hudson County must be that rate which most equitably distributes the burden of county government among the constituent municipalities. The real issues in this case relate to the determination of which rate produces the fairest result, consistent with the overriding goal of the Legislature, and, if the existing practice is not statutorily or constitutionally proper, whether the court was authorized to create the remedy it imposed.

For the reasons hereinafter expressed, we remand for further proceedingss.

Appendix C

A.

In the case of the added and omitted assessments, there is discrimination in the sense that the components that make up the rate are not uniform among Hudson County municipalities. The crucial difference flows from the stipulation that added and omitted assessments are not used to fund the county vocational school. Here, it was stipulated that none of the added or omitted taxes are in fact used for the vocational school but are used for general county purposes. Thus, as plaintiff argues, it "and the ten (10) other municipalities in Hudson County are taxed for the added and omitted assessments at the higher of the dual rates, while Bayonne is taxed at the lower of the dual rates, yet none of the proceeds of taxation for added and omitted assessments at the higher rate is applied to the funding of the vocational school."

Particularly in light of the agreement of counsel that the added and omitted assessments are not used to fund the county school, there appears to be justification for the judge's conclusions that the present system is discriminatory and unlawful. However, we decline to decide the issue because the City of Bayonne as well as the Hudson County municipalities are entitled to be heard, and it should therefore be given the opportunity to address the threshold claim. We thus remand because Bayonne and the other municipalities, while given notice of the suit, were not joined as parties. Moreover, plaintiff raises constitutional issues on this appeal which should be addressed in the first instance by the trial judge.

R. 4:28-1(a) provides, in pertinent part, that a person shall be joined as a party "if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest in the subject of the action and is so situated that the disposition of

the action in his absence may . . . (i) as a practical matter impair or impede his ability to protect that interest." According to Judge Pressler, "indispensability is usually determined from the point of view of the absent party and in consideration of whether or not his rights and interests will be adversely affected." *Pressler, Current N.J. Court Rules,* Comment *R.* 4:28-1 (1988).

In the present case, both defendants alleged in their answers that all of the municipalities in Hudson County were indispensable parties to the action. Defendants pressed the point on the return of the order to show cause. The judge disagreed. However, his ruling directly affects all municipalities, and the parties in fact stipulated that if there was any reduction in the rate used for calculating added and omitted assessments, "one effect would be to increase the amount of County taxes to be apportioned amongst all Hudson County municipalities."

The other municipalities, especially Bayonne, were therefore indispensable parties in the sense that plaintiff's proposed solution, and at least to some degree, the remedy adopted by the trial judge, adversely affected Bayonne and its taxpayers. Furthermore, if plainitff is correct in its contention about the remedy imposed, the other municipalities were adversely affected. Moreover, there is an obvious practical advantage to joining Bayonne and the other municipalities as parties. One would expect that Bayonne in particular would strive to show precisely how any change in the existing scheme would affect its taxpayers. It would certainly be helpful to have more information about the impact of the judge's solution or plaintiff's proposed solution. With such information a court would be in a better position to construe the phrase "county rate" in a manner most consistent with the overriding goal of the legislation, namely to insure "that the fiscal burden of county government shall be apportioned equally and

impartially among the several municipalities." *Clifton v. Passaic County Bd. of Taxation, supra*, 28 *N.J.* at 418. The record discloses that even the judge was unsure about the practical impact of his decision, although he endeavored to apply that principle in developing the remedy he created.

B.

In its reply brief, plaintiff contends that the system employed by the county board is invalid and unconstitutional, because *N.J. Const.* (1947), Art. VIII, §I, par. 1(a), provides that "[p]roperty shall be assessed for taxation under general laws and by uniform rules." The subject was not raised in the complaint, nor before the trial court, and was not addressed in plaintiff's main brief filed with this court; and it is improper to raise new arguments in a reply brief before us. *Brown v. Shaw*, 174 *N.J. Super.* 32, 39 (App. Div. 1980). The new contentions relate to both the claim for relief and remedy, and should be addressed initially by the trial court.

As the matter must be remanded so that indispensable parties may be joined, the constitutional issues should be presented simultaneously, so that all interested parties may respond. On remand, the trial judge should liberally permit amendment of the pleadings to add the necessary parties, claims and defenses. The trial judge should initially decide the constitutional issues raised, unless he feels the matter can properly be resolved by statutory construction which avoids a constitutional claim.

While the court may adhere to its initial determination as to the impropriety of the present system, we emphasize that such a holding does not necessarily require entry of the relief sought by plaintiff or imposed by the court.

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It is argued before us that the court exceeded its authority by ordering the county to segregate a portionof the money received by way of added and omitted assessments for the use of the county vocational school. Plaintiff cites *Robinson v. Cahill,* 70 *N.J.* 155 (1976), for the proposition that a trial court does have the authority "to fashion an appropriate remedy for the violation of a statute." The relief ordered in *Robinson* was a last resort and followed prior decisions in the same case in which the Supreme Court had urged the legislature to take action to provide a remedy. See *Robinson v. Cahill,* 62 *N.J.* 473 (1973); 63 *N.J.* 196 (1973). *See also* 70 *N.J.* 155 (1976); 70 *N.J.* 464, 465 (1976). We do not address the propriety of the remedy fashioned here because of the need for further review of the matter by trial judge after hearing from all indispensible parties.[2]

In essence, we conclude that the existing scheme utilized by the board should not have been addressed until all of the municipalities in the county had been joined and it was clear how any change ordered would affect the respective tax burdens of the various municipalities. We therefore remand to permit the development of a complete record and consideration of the significant and important public issues in light of the factual determinations and appropriate law. We do not retain jurisdiction.

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2. We do not suggest that this remedy might not be appropriate after all parties have had an opportunity to be heard.